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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 116

MAX W. WINN AND SAMUEL BLOOM,
Appellants,

v.

THE PITTSTON COMPANY
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT AS TO JURISDICTION

JOHN J. WICKHAM, JR.,
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MAX W. WINN and SAMUEL BLOOM, Appellants, applicants herein for an appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of Appeals of the State of Virginia, dated and entered on the 15th day of January, 1951, Petition for Rehearing denied on March 15, 1951, in accordance with the requirements of Paragraph 1, Rule 12 of the Rules of the Supreme Court of the United States, herewith present this typewritten state-

ment of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

I

Statutory Provision Sustaining the Jurisdiction of the Supreme Court of the United States

This is an appeal under Section 1257(2) of Title 28, United States Code, approved June 25, 1948, effective September 1, 1948, from a final judgment of the Supreme Court of Appeals of Virginia, dated and entered on the 15th day of January, 1951, Petition for Rehearing denied on March 15, 1951, which is a final judgment rendered in the highest court of the State of Virginia in which a decision could be had, where is drawn in question the validity of a statute of the State of Virginia on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

That decision was rendered by a minority of the Supreme Court of Appeals of Virginia, only three Justices concurring out of a total of seven Justices, and was dissented from by Chief Justice Hudgins and by Senior Associate Justice Gregory. The said decision was directly contrary to the provisions of Article VI, Section 88 of the Constitution of Virginia[1] which expressly require the concurrence of not less than four justices to decide a case involving the constitutionality of a statute.

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[1] The pertinent portion of this section of the Virginia Constitution reads as follows:

> ". . . the assent of at least four of the judges shall be required for the court to determine that any law is or is not repugnant to the Constitution of this State or of the United States; . . .".

II

State Statute the Validity of Which Is Involved

The statute of the State of Virginia, the validity of which is involved, is Section 3822a of an Act of the General Assembly of Virginia, approved March 31, 1944 (Acts of the General Assembly of Virginia, 1944, Chapter 367, Page 529, Section 3822a; Section 3822a of Michie's 1948 Supplement to Michie's 1942 Code of Virginia; Sections 13-47 through 13-54 of the Title 13 of the 1950 Code of Virginia), which is an amendment to and reenactment of Section 3822 of what is generally known as the Virginia Merger Statute, (Acts of the General Assembly of Virginia, 1922, Chapter 380, Page 632; Section 3821 et seq of Michie's 1942 Code of Virginia; Sections 13-40 et seq of Title 13 of the 1950 Code of Virginia).

Section 3822a, the section directly involved in this Appeal, is appended hereto marked "Appendix A". This section provides a remedy for dissatisfied stockholders of a corporation which has consolidated or merged with another. This statutory remedy has been previously construed by the Supreme Court of Appeals of Virginia to be the only and exclusive remedy which must be pursued by all such stockholders, *Adams* v. *United States Distributing Corporation*, 184 Va. 134, 34 S.E.(2d) 244; certiorari denied, 327 U.S. 788, 66 S. Ct. 807, and thus excludes dissatisfied stockholders from the equitable remedy which was available to them prior to the Act, as illustrated by *Winfree* v. *Riverside Cotton Mills*, 113 Va. 717, 75 S.E. 309.

Under this exclusive remedy, a dissatisfied stockholder to a merger or consolidation must signify his dissent by notice in writing within three months after the date of the meeting of his corporation to act upon the merger or consolidation agreement. Failure to serve this notice forever

precludes the stockholder from objecting, and he is deemed to have elected to participate in the consolidation or merger. If the notice is given, the stockholder is entitled to receive from the consolidated or merged corporation the fair cash value of his stock as of the day before the vote for the merger was cast. If the stockholder and the consolidated or merged corporation cannot agree as to the fair cash value, the statute provides for the appointment of appraisers to determine the fair cash value.

The Supreme Court of Appeals of Virginia has construed this statute to deny interest to the minority dissenting stockholders on the fair cash value of their stock for the interval elapsing between the date of the merger, when the dominant merging majority took over the assets of the dissenting minority (in this case January 1, 1943), and the date of judicial confirmation of the appraisers' determination of the fair cash value (in this case November 17, 1949).

III

Dates of Judgment and Presentation of Application for Appeal

The judgment of the Supreme Court of Appeals of Virginia sought to be reviewed was dated, filed and entered on January 15, 1951. A timely Petition for Rehearing to this decision was denied on March 15, 1951. That decision of January 15, 1951, was by a 3-2 decision, Chief Justice Hudgins writing a dissenting opinion concurred in by Senior Associate Justice Gregory. Two of the seven members of the court did not participate in the case.

The Petition for Appeal was presented to the Honorable Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia on May 9, 1951, and was by him allowed on that date, this being within the 90 day period as required

by Section 2101(c) of Title 28 of the United States Code. *Gypsy Oil Co.* v. *Escoe,* 275 U.S. 498, 48 S. Ct. 112.

IV

Nature of the Case and Manner in Which Federal Questions Were Raised

On January 1, 1943, The Pittston Company and the United States Distributing Corporation, a corporation organized under Virginia law, merged under the provisions of the Virginia Merger Statute. The Pittston Company became the surviving corporation, and, prior to the merger, was the dominant majority stockholder in U. S. Distributing, holding over half the voting stock. The present appellants were owners of shares of 7% preferred stock of U. S. Distributing, and voted against the merger.

Pursuant to Virginia law, the dissatisfied stockholders gave timely notice that they dissented to the merger, and instituted an equity action in the Law and Equity Court of the City of Richmond seeking a determination of the value of their stock. They claimed in that suit $184.00 per share, ($100.00 per share plus accrued and unpaid dividends of $84.00 per share), basing their claim on the stock contract with U. S. Distributing Corporation. The Supreme Court of Appeals of Virginia held that the Virginia Merger Statute provided the exclusive remedy for dissenting stockholders and that this statutory proceeding had replaced and eliminated the previously existing right of dissenting stockholders to invoke the aid of equity. The Supreme Court of the United States denied certiorari. *Adams* v. *U. S. Distributing Corporation,* 184 Va. 134, 34 S.E.(2d) 244, certiorari denied 327 U.S. 788, 66 S. Ct., 807.

After this action failed, The Pittston Company sought to bind these dissenting stockholders to the results of a

previous statutory appraisal for certain other stockholders which had been concluded during the litigation in the *Adams* case, *supra*. This effort by Pittston failed, for the reason that these dissenting stockholders were not parties to the appraisal procedure. *O'Hara* v. *The Pittston Company*, 186 Va. 325, 42 S.E. (2d) 269. Following the determination of the *O'Hara* case, *supra*, the Chancery Court appointed a new set of appraisers to determine the fair cash value of the stock of these dissenting stockholders pursuant to the Virginia Merger Statute. Pittston, the taking corporation and the dominant majority stockholder in U. S. Distributing, offered only $34.75 per share, and these dissenting stockholders were compelled to go through litigation to determine the fair cash value of their stock.

The new appraisers made their report on April 11, 1949, that the fair cash value of the dissenters' stock was $57.75 per share, as of the day before the date of the vote for the merger, December 21, 1942. On November 17, 1949, the Chancery Court confirmed the appraisers' report and awarded interest at the legal and customary rate of 6% per annum on the value of the stock from the date of the merger until the date of payment. The Pittston Company appealed the award of interest, and it is from the action of the Supreme Court of Appeals of Virginia reversing the Chancery Court on its award of interest that this appeal is taken.

During the interval of nearly seven years between the date of the merger and the judicial confirmation of the appraisers' award of $57.75 per share,—while these dissenting stockholders were involved in litigation over their rights as minority stockholders and the appraisal of the value of their stock,—these dissenting stockholders have received neither the fair cash value of their stock, nor any compensation by way of interest or otherwise for the

use of that fair cash value by the dominant merging majority. The record shows that the assets taken from these dissenting stockholders by Pittston produced $12.53 per share, after taxes, during the very first year after the merger. The interest awarded by the Chancery Court—and taken away by the minority decision of the Supreme Court of Appeals—amounts to only $3.47 per share per annum.

The Federal question raised is that the exclusive remedy provided to dissatisfied stockholders in the Virginia Merger Statute is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States as construed to deny interest to dissatisfied stockholders on the fair cash value of their stock from the date of merger until the date of payment. This question was first raised in the Chancery Court in argument preceding the judgment of November 17, 1949, as appears on Page 2 of Record No. 3718 as follows:

> "In the two days' argument before the Court, September 26-27, counsel for O'Hara and other dissenting stockholders, raised and argued, among other points, the point that failure to allow interest would be unconstitutional since it would have the effect of depriving dissenting stockholders of their property without their consent and without just compensation and consequently without due process of law."

This Federal question was presented to the Supreme Court of Appeals in the brief filed by the dissenting stockholders, Point III, Pages 45-54 of that brief. As summarized on Page 53 of that brief, the position was taken by these dissenting stockholders that an allowance of interest on the fair cash value of their stock from the time of the merger until the date of payment was a necessary element of just compensation; and, to construe the

Virginia Statute to deny interest was to deprive these dissenting stockholders of their property without just compensation and without their consent, contrary to the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution.

The Federal question was again raised by the Petition for a Rehearing filed with the Supreme Court of Appeals. Point II of that Petition, Pages 6-17, urged that the statute, as construed by the majority of the court, was repugnant to the due process clause of the Fourteenth Amendment. Pertinent portions of the brief and the Petition for Rehearing filed with the Supreme Court of Appeals on this Federal question are included as a part of the record, pages .

The Supreme Court of Appeals made no specific reference to the Federal Constitutional issue raised before it, but, by denying interest to the dissatisfied stockholders, construed the statute in such a way as to be contrary to the due process clause of the Fourteenth Amendment. A copy of the opinions of the Supreme Court of Appeals, both majority and dissenting, are appended hereto, marked "Appendix B".

V

The Federal Question Involved Is Substantial

The ultimate Federal question presented to the Chancery Court of the City of Richmond, and, in turn, to the Supreme Court of Appeals of Virginia, is whether a state statute which provides an exclusive statutory remedy for a dissatisfied stockholder in a corporate merger, is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States when the statute is construed by the highest court in the State to deny to

dissatisfied stockholders, who dissent to the merger, interest on the fair cash value of their stock from the date of the merger until the date the findings of the appraisers are confirmed.

In rejecting the appellants' contention that the statute as construed was contrary to the provisions of the Fourteenth Amendment, it is submitted that the Supreme Court of Appeals decided a question which has not been previously determined by the Supreme Court of the United States, and decided it in a manner not in accord with applicable decisions of the Supreme Court. *Jacobs* v. *United States*, 290, U.S. 13, 54 S. Ct. 28; *Dohany* v. *Rogers*, 281 U.S. 362, 50 S. Ct. 299; *Phelps* v. *United States*, 274 U.S. 341, 47 S. Ct. 611; *Seaboard Air Line Railway Company* v. *United States*, 261 U.S. 299, 43 S. Ct. 354; *Missouri Pacific* v. *Nebraska*, 169 U.S. 403, 17 S. Ct. 130.

It is of considerable public importance that the question presented here be resolved by the Supreme Court. While the number of litigants involved here is relatively small, the question concerns the rights of countless hundreds of thousands of stockholders throughout the nation. Virginia is a popular state as regards domestication of corporations, and the Virginia laws directly affect the property of vast multitude of stockholders in other states of this Union, as well as in Virginia. Here, for example, U.S. Distributing Corporation, the Corporation which was merged, was a Virginia Corporation with assets of approximately seventeen million dollars, consisting largely of revenue producing securities of other corporations in New York, Pennsylvania and Wyoming. In addition to the stockholders in Virginia corporations, stockholders in many other states with similar statutes—among them being Delaware, New Jersey and Maryland—are also concerned with this question.

A

The Statute, as Construed by the Supreme Court of Appeals, Is Repugnant to the Fourteenth Amendment to the Constitution of the United States.

Section 3822a of the Virginia Merger Statute, as construed by the Virginia Supreme Court, permits a corporation to take, by merger, the assets of a dissatisfied minority of another corporation and have the use of these assets for the length of time required for the statutory appraisal proceedings, without paying the dissatisfied minority any interest or other compensation whatever on the fair cash value of the stock. The taking corporation pays only the fair cash value as of the time of the merger, but has the use of the assets of the minority, plus the money the minority ultimately receive for their stock, for the period of litigation, in this case almost 7 years, for which it pays nothing under Virginia law, as now construed by the Supreme Court of Appeals of Virginia.

It is respectfully submitted that such a statute violates the due process requirement of the Federal Constitution that a property owner receive just compensation for property taken from him.

It seems definitely settled that due process of law requires that a person receive just compensation for that which is taken from him by state action. This right, while most often expressed in condemnation cases, is not limited to those cases. This right is guaranteed by the Fourteenth Amendment. The sweeping provisions of this Amendment are not limited to condemnation cases, but stand as a constitutional limitation on state action under which an owner of property may be deprived of his property, without reference to any particular method employed or property taken.

This was long ago settled in *Missouri Pacific* v. *Nebraska*, 164 U. S. 403, 17 S. Ct. 130. There, private individuals asked the State Transportation Board, pursuant to state law, to require the Missouri Pacific to give them the right to use railroad property for private purposes, without the railroad's consent. The state court permitted the use. The Supreme Court refused to sanction this state action, pointing out that the taking, through state action,

> ". . . of the private property of one person or Corporation, without the owners' consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendments of the Constitution of the United States" (164 U. S. 113).

It thus appears that the Fourteenth Amendment is not limited to condemnation proceedings or proceedings involving public use of property. It is applicable to any state law or action under which one person may take or use property of another person for a private purpose. It is applicable to the statute before this Court.

The Fourteenth Amendment being applicable to this statute, the question rises as to whether the requirements of the due process clause of that Amendment are satisfied by the Virginia statute as construed by the Virginia Supreme Court. This, in turn, produces two issues: Whether the Fourteenth Amendment requires just compensation and whether the Virginia statute denies just compensation.

In *Dohany* v. *Rogers*, 281 U. S. 362, 50 S. Ct. 299, the Supreme Court demonstrated that the due process clause of the Fourteenth Amendment requires just compensation. There it was urged that the Michigan condemnation statute did not insure just compensation to the property owner, and that statute was attacked as violative of the Fourteenth

Amendment for this reason. The Supreme Court pointed out that the due process clause does require just compensation in these words:

> "The right to just compensation to which appellant is entitled under the due process clause, without regard to the particular procedure employed, is guaranteed both by the Fourteenth Amendment and Article 13 of the Michigan Constitution . . ." (50 S. Ct. 301).

There is nothing in the Fourteenth Amendment which says that due process and just compensation are required only in condemnation cases. The Amendment is broad and applies to any state action whereby a person may be deprived of his property. Due process and just compensation are essential whenever any property is taken from any person under state law.

The fact that here a private corporation, rather than the state, is acquiring the property does not remove the action from the application of the Fourteenth Amendment, nor does the fact that the procedure is not one of condemnation. Here, as in the *Dohany* case, *supra*, a state law is being used to deprive private persons of their property, and the Fourteenth Amendment requires that those private persons receive just compensation for that which is taken from them pursuant to state law. The Fourteenth Amendment does not require payment of just compensation in condemnation cases simply because they are condemnation cases and the state is taking the property, but the Amendment requires just compensation because private persons are being deprived of their property under state law without their consent. The purpose of the Amendment is to protect private persons from actions taken under a state law, not to solely limit the state in the exercise of the power of eminent domain. The exercise of that power is just one of

the procedures which must meet the requirements of the Amendment. The Amendment applies equally to the exercise, by any one, of any alleged rights based on state law whereby a person is deprived of his property without his consent and without just compensation.

That the action here under which Pittston acquires the assets of the dissatisfied stockholders and uses these assets for several years without paying interest for this use, meanwhile retaining the cash value of the stockholders' stock certificates, is action under state law is clear. The procedure adopted by Pittston is that prescribed by the Virginia Merger Statute, and the denial of interest is judicial action by the state. On numerous occasions, and recently in *Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 836, the Supreme Court has given specific recognition that judicial, as well as legislative, action under which individuals acquire or enforce individual claims is to be regarded as state action for purposes of the Fourteenth Amendment.

The Fourteenth Amendment being applicable to this procedure and requiring just compensation, the inquiry comes down to whether interest on the fair cash value of the dissatisfied stockholders' stock is a necessary element of just compensation. There seems to be no question about this.

In *Jacobs* v. *United States*, 290 U. S. 13, 54 S. Ct. 26, the Supreme Court pointed out that:

> ". . . the concept of just compensation is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking'. Interest at a proper rate 'is a good measure by which to ascertain the amount so added' " (54 S. Ct. 28).

And in *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 43 S. Ct. 354, the Court, in considering a Federal condemnation statute which was silent on the question of whether interest should be allowed on the fair value—the same point before this Court—pointed out that interest must be allowed:

> "There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute" (261 U. S. 306).

To the same effect is *Phelps* v. *United States*, 274 U. S. 341, 47 S. Ct. 611, Where the Supreme Court said:

> "Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation" (147 S. Ct. 612).

What is present in this case is a judgment in 1949 for the value of property taken in 1943 and used since then, without any interest on the value determined as of the time of the taking.

Under these authorities, it is submitted that the Supreme Court of Appeals of Virginia should have construed Section 3822a of the Virginia Merger Statute to allow interest on the fair cash value of the Appellants' stock from the date of the merger until the date of payment. The failure of that Court to so construe the statute permits the statute to become a trap for minority dissenting stockholders and an unfair weapon in the hands of the dominant majority of a corporation. The statute, as construed, permits a corporation to despoil a helpless stockholder. Under the law as construed by the Supreme Court of Appeals of Virginia: (1) the taking corporation can offer an obviously inadequate

sum to the dissatisfied stockholder as its opinion of the "fair cash value";[2] (2) the dissatisfied stockholder, generally a small investor with small funds—the large investor being with the majority—must then undertake expensive litigation or accept the inadequate sum; (3) if the dissatisfied stockholder undertakes the litigation he will receive, at the conclusion, no more than he should have received on the day of the merger, for the taking corporation does not have to pay any interest, though it has, during the litigation, used the dissenters' proportionate share of the assets and profitted therefrom and also had the use of the money representing the fair cash value which it eventually must pay for the stock.

This will naturally cause dissenters to accept the inadequate cash value offer tendered by the taking corporation, even though it be grossly inadequate; for the loss of interest and the loss of use of the money during the litigation makes it expensive and impractical to the average stockholder.

If, however, interest must be paid by the taking corporation when the cash value is fixed by the court at the proper amount, it will discourage the taking corporation from offering a grossly inadequate amount. In this way, both the taking corporation and the dissenting stockholder will be protected. That is the purpose of the Fourteenth Amendment. As construed, Section 3822a of the Virginia Merger Statute violates that constitutional requirement of due process.

The taking of corporate assets in a merger is not a natural act of an individual under the United States or State

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[2] As in this case, where Pittston offered the dissenting stockholders only $34.75 per share, although the book value was approximately $124.00 per share.

Constitutions. Only the legislature or Congress may adopt legislation authorizing this to be done. That is condemnation. While private property is usually taken for public use, the State and Nation may authorize its taking for private use, when in the public interest. But it is still condemnation by the State and the taking must be governed by the rule of just compensation, which includes the grant of interest, whenever payment is not made contemporaneously, or practically so, with the taking.

This Court has held that under the Fourteenth Amendment the United States itself may not take property under its power of condemnation, without paying the owner just compensation which includes interest. Certainly this Court will not hold that, despite the Fourteenth Amendment, the United States or a State may allow a private person to take property of another private person under State law, without requiring the private person to pay the owner just compensation, including interest.

Summary as to Substantial Federal Question

It appears from the foregoing that the Supreme Court of Appeals of Virginia, in construing Section 3822a of the Virginia Merger Statute to deny interest to these dissatisfied stockholders, has construed the Statute in such a way as to be repugnant to the Fourteenth Amendment to the Constitution of the United States, and has decided a Federal question of substance not heretofore determined by this Court and in a manner not in accord with applicable principles that have been firmly established by prior decisions of this Court, concerning the requirements of due process of law as guaranteed by the Fourteenth Amendment.

It is therefore respectfully submitted that this Court has jurisdiction of this appeal by virtue of said Section 1257(2)

of Title 28, United States Code, approved June 25, 1948, effective September 1, 1948.

Respectfully submitted,

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APPENDIX A

SECTION 3822a OF ACTS OF GENERAL ASSEMBLY OF VIRGINIA APPROVED MARCH 31, 1944, (ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, 1944, CHAPTER 367, PAGE 529)

§3822-a. *Remedy of Dissatisfied Stockholders.*—(a) If any stockholder of either of the corporations so consolidated or merged who has not given assent thereto and who is dissatisfied therewith, signifies his dissent by notice in writing served on the president, secretary or treasurer, either within or without this State, of the consolidated or merged corporation, or on the statutory agent thereof, if such agent has been appointed, at any time within three months after the date of the meeting of his corporation to act on the consolidation or merger agreement, he shall be entitled to receive from the consolidated or merged corporation the fair cash value of his stock as of the day before the vote for the agreement of consolidation or merger of his corporation was so cast as aforesaid, which fair cash value if not agreed on between the dissenting stockholder and the consolidated or merged corporation shall be determined in the manner hereinafter provided; and if any stockholder who has not given assent thereto fails to signify his dissent by notice in writing served upon the consolidated or merged corporation in the manner hereinafter directed within three months after the date of the meeting of his corporation, he shall be forever precluded from objecting to the consolidation or merger and shall be deemed to have elected thereby to participate in the agreement or plan of consolidation or merger on the basis therein provided for stockholders of his class, and such stockholder shall not thereafter be entitled to demand or receive the fair cash value of his stock in his corporation, but his rights shall thereafter be confined to participation in the agreement or plan of consolidation or merger, and to the stock of the consolidated or merged corporation to which he is entitled, and all of his rights under

the stock of his consolidating or merging corporation shall thereupon cease and determine.

(b) If such dissenting stockholder and the merged or consolidated corporation do not, within one month from the date of the service of the notice by him upon the merged or consolidated corporation, agree upon the fair cash value of his stock as of the day before the vote for the agreement of consolidation or merger was cast, he may, upon reasonable notice to the consolidated or merged corporation given in the manner in which the notice of his dissent is hereinbefore directed to be given, apply to the circuit court of the county or the circuit or corporation court of the city wherein the principal office of the corporation of the dissenting stockholders is located, or to the judge thereof in vacation, or to the chancery court of the city of Richmond, or to the judge in vacation in the event the principal office of his corporation is located in the city of Richmond, to have the fair cash value of his stock, as of the date aforesaid, appraised by three disinterested persons, residents of this State, appointed by the court; or the consolidated or merged corporations may likewise, upon reasonable notice to such dissenting stockholder, either served upon him personally or sent to him by registered mail at his last known post office address, as same appears on the books of the corporation, apply to such court or the judge in vacation to have the fair cash value of the stock of the dissenting stockholder, as of the date aforesaid, appraised by three disinterested persons, residents of this State, appointed by the court; and it shall be the duty of the court, or judge in vacation, to appoint the appraisers on reasonable notice, on the application of either party; provided that if notice of the consolidated or merged corporation to apply to the court for the appointment of appraisers is not served upon such stockholder within this State, and if such stockholder does not appear before the court on the day fixed in the notice the petition or application of the consolidated or merged corporation for the appointment of appraisers to appraise and determine the fair cash value of the stock shall be continued to such time as the court designates, and an order of publication shall be entered against him requiring him to

appear before the court or the judge in vacation at such time and place as designated in the order, which order shall be published once a week for two successive weeks in a newspaper published or having a general circulation in the county or city in which the proceeding is pending; and upon the day fixed in the order, or at any subsequent time to which the matter is continued, whether the stockholder has appeared or not, the court shall appoint three disinterested persons, residents of this State, to appear and determine the fair cash value of the stock.

(c) The appraisers so appointed shall investigate the condition of the corporation of the dissenting stockholder, and report to the court or to the judge in vacation as promptly as possible the fair cash value of the stock of the dissenting stockholder as of the day before the vote for the agreement of consolidation or merger of his corporation was so cast as aforesaid, and the appraisers shall have the right to administer oaths and to take such evidence as is necessary in determining the value of the stock, and may conduct their proceedings either within or without the State of Virginia; provided that the appraisers shall give notice of the time and place of their first meeting to the dissenting stockholder and to the consolidated or merged corporation at their last known post office address, by registered mail at least ten days before the date of the meeting, and thereafter no notice of adjournment, if any, either from time to time, or from place to place, to either party shall be necessary. The court in which such proceedings are pending, or the judge in vacation, may order production before appraisers at such time and place as specified of all such books and accounts and other records of the corporation of the dissatisfied stockholder, or of the consolidated or merged corporation, as necessary or desirable in determining the value. The finding of a majority of the appraisers shall stand as the action of the appraisers. The appraisers shall make their report to the court or to the judge in vacation, in writing, and shall return with their report such evidence as they have taken during their investigation.

(d) If such stockholder, or the consolidated or merged corporation, be dissatisfied with the fair cash value as

determined by the appraisers, he or it as the case may be, *may, within thirty days from* the date the report of the appraisers is filed in court, or with the judge in vacation, and upon reasonable notice to the other party given in the manner hereinbefore provided, except that no further order of publication shall be necessary as to dissenting stockholder, apply to the court or the judge in vacation to set aside the finding of the appraisers; and the court or judge if of the opinion that the valuation is just shall deny the application and, after thirty days from the date the report of the appraisers was filed, shall confirm same and the amount thereof, but if the court or judge be of opinion that the valuation is not just, the report and the amount thereof shall be set aside, and when set aside the court or judge shall proceed to ascertain the fair cash value of the stock of such stockholder, as of the day aforesaid, and shall enter judgment against the consolidated or merged corporation accordingly, which judgment may be collected as other judgments of a court of competent jurisdiction are collectible, and its finding and judgment shall be final and conclusive upon all parties to the proceedings; and if no such application is made within thirty days after the report is filed, the court or judge shall immediately confirm the report, and the amount thereof shall be final and conclusive upon all parties to the proceeding. In any case in which the report of the appraisers is confirmed as hereinbefore directed the amount thereof shall immediately become and be a final judgment of the court against the consolidated or merged corporation and may be collected as other judgments of a court of competent jurisdiction are by law collectible.

(e) Upon payment or tender of payment by the consolidated or merged corporation of the value of the stock so ascertained, the dissenting stockholder shall deliver up his certificate of stock to the consolidated or merged corporation, if any has been issued, and if none has been issued shall make a due assignment to the consolidated or merged corporation of all his rights in respect thereto, and shall mark the judgment satisfied, and the consolidated or merged corporation may thereafter issue and dispose

of the stock to which the dissenting stockholder would have been entitled under the agreement of consolidation or merger had he not dissented therefrom; and if the dissenting stockholder refuses to receive the value so ascertained when payment is tendered to him or refuses or fails to surrender and deliver up his certificate of stock upon the tender of payment, or refuses or fails to mark the judgment satisfied, the consolidated or merged corporation shall have the right to deposit to the credit of the court in which the proceeding is pending the value of the stock so ascertained and determined, and the court or judge shall enter an order reciting the deposit and declaring the judgment satisfied and discharging the consolidated or merged corporation from any or all further liability thereunder, and shall direct the clerk of the court to mark the judgment satisfied. Thereafter the rights of the stockholder under his stock in the consolidating or merging corporation shall cease and determine and his sole right shall be to receive the cash so deposited upon surrender to the consolidated or merged corporation of the certificate or certificates representing same if any were issued to him, and the consolidated or merged corporation may issue and dispose of the stock to which the dissenting stockholder would have been entitled under the agreement of consolidation or merger had he not dissented therefrom.

(f) The court or judge may in the same proceeding, upon application of the consolidated or merged corporation, enjoin the sale, negotiation or other disposition of the stock certificate or certificates held by the stockholder and may compel their surrender by him with appropriate endorsement to the consolidated or merged corporation.

(g) The appraisers appointed pursuant to this section shall receive such compensation as is allowed to them by the court in the order making the appointments and their reasonable expenses incurred in connection with their investigation, to be paid by the consolidated or merged corporation.

(h) In all cases when statutes of this State now in force and effect authorize the union or consolidation and merger of the stock, property and franchises of any corporation

of this or any other State with and into the stock, property and franchises of any other corporation or corporations of this or any other State, and provide that such union or consolidation and merger shall be taken and deemed complete so soon as the agreement thereof is filed in the office of the board of public works, such agreement shall be filed in the office of the Commission, and when so filed shall have the same force and effect as if same had been filed in the office of the board of the public works.

APPENDIX "B"

191 Va. 886; 63 S.E. (2d) 34

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

January 15, 1951

THE PITTSTON COMPANY

v.

E. FRANK O'HARA, et als.

Before Hudgins, C. J., and Gregory, Eggleston, Spratley and Buchanan, JJ.

EGGLESTON, *Justice:*

For the third time we are here called upon to decide important rights of certain persons holding preferred stock in the United States Distributing Corporation, a Virginia corporation, who dissented from the merger of that corporation with The Pittston Company, a Delaware corporation, under the name of the latter. The merger became effective on December 31, 1942.

On June 2, 1943, Maurice D. Adams, E. Frank O'Hara, and certain other dissenters, whom we will refer to as the "Adams-O'Hara group," having notified The Pittston Company, the merged corporation, that they elected to dissent from the merger, filed in the Law and Equity Court of the city of Richmond a bill in equity under the style of Adams v. United States Distributing Corp., for the

determination and recovery of the fair cash value of their stock.

On the first appeal, taken from a decree entered in that cause, we held that the appraisal proceeding under Code, § 3822, as amended, was the exclusive remedy which must be pursued by all of the dissenting stockholders in order to have their stock valued and paid for, and that an independent suit in equity could not be maintained for that purpose. Adams v. United States Distributing Corp., 184 Va. 134, 34 S.E. 2d 244, 162 A.L.R. 1227, certiorari denied, 327 U.S. 788, 66 S. Ct. 807, 90 L. Ed. 1014.

In the meantime The Pittston Company had instituted in the Chancery Court of the city of Richmond, hereinafter referred to as the lower court, a proceeding under the statute and under the style of Pittston Co. v. Ungerleider & Co. et al., for an appraisal of the fair cash value of the stock of the dissenters. All of the dissenters, except the members of the Adams-O'Hara group, were made parties defendant to this proceeding. This statutory proceeding culminated in a decree entered on December 6, 1944, fixing the fair cash value of the stock of those defendant dissenters at $55 per share. For convenience we shall refer to that as the first appraisal. By the further terms of this decree The Pittston Company was directed to pay to those defendant dissenters such ascertained cash value, plus interest from the effective date of the merger to October 22, 1944, the latter date having been fixed by stipulation of counsel.

After our decision on the first appeal the lower court, on the motion of The Pittston Company and over the objection of members of the Adams-O'Hara group, entered a decree on April 16, 1946, holding that the members of this group should receive for their stock the same value which had been fixed in the first appraisal, namely, $55 per share. In this latter decree interest was allowed to the members of the Adams-O'Hara group on the value of their stock from the effective date of the merger until paid. The Pittston Company was unsuccessful in its contention that such interest should cease on October 22, 1944, as had been decreed in the case of the other dissenters.

Some of the members of the Adams-O'Hara group abided by the terms of this decree of April 16, 1946, surrendered their certificates and accepted the sum of $55 per share with interest. However, nine members of the group appealed and at their instance we reversed and annulled the decree, on the ground that inasmuch as these dissenters were not parties to the first appraisal proceeding and had taken no part therein, the decree of December 6, 1944, fixing the value of the other dissenters' stock at $55 per share, was not *res judicata* as to or binding on the members of the Adams-O'Hara group. Hence, we held, the lower court erred in imposing upon this group of dissenters, by the decree of April 16, 1946, the same valuation of the stock which had been fixed for the other dissenters in the decree of December 6, 1944. The dissenting members of the Adams-O'Hara group were, we said, entitled to a new and independent appraisal, and the cause was remanded for that purpose. O'Hara v. Pittston Co., 186 Va. 325, 42 S.E. 2d 269, 174 A.L.R. 945.

In their petition for the appointment of new and independent appraisers the members of the Adams-O'Hara group demanded interest on the ascertained fair value of their stock from the effective date of the merger until they were paid.

The Pittston Company, in its answer to this petition, again asserted that these dissenters were not entitled to interest beyond October 22, 1944, that being the date on which interest had stopped running in the case of the other dissenters, under the terms of the decree of December 6, 1944.

New appraisers were appointed, and on April 11, 1949, they filed their report fixing the fair cash value of the stock held by the nine members of the Adams-O'Hara group at $57.75 per share as of the effective date of the merger.

Both The Pittston Company and the dissenters filed written exceptions to this report. However, The Pittston Company withdrew its exceptions and by leave of court and over the objection of the dissenters filed an amended answer, in which it took the position that these dissenters

were "entitled to no interest whatsoever" on the ascertained fair cash value of their stock.

On November 17, 1949, the lower court entered a decree confirming the appraisers' report as to the fair cash value of the stock of the members of the Adams-O'Hara group. Over the objection of The Pittston Company it decreed that the dissenters were entitled to interest at the rate of six per cent. per annum upon such ascertained value from the effective date of the merger until paid, and entered judgment in favor of each of the nine dissenters against The Pittston Company accordingly.[3]

From this decree The Pittston Company has appealed. It does not question the adjudication of the fair cash value of the dissenters' stock. Its sole contention is that the dissenters are entitled to interest, not from the effective date of the merger, but from November 17, 1949, the date of the entry of the decree fixing the value of their stock.

Whether the appellee dissenters are entitled to interest on the fair cash value of their stock, as they claim and as the lower court held, from the effective date of the merger, depends upon a proper interpretation of the statute.[4]

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[3] The lower court incorporated in the record no written opinion as the basis of this decree. Counsel for the appellees have filed as an appendix to their brief what they say is a "substantially accurate" memorandum made by them of the court's oral opinion.

Counsel for the appellant question the accuracy and completeness of this memorandum.

[4] At the time of the merger, which became effective on December 31, 1942, the applicable statute was Code, § 3822, as amended by Acts 1922, ch. 380, pp. 625, 632-637, which is copied in a footnote in the opinion on the second appeal. O'Hara v. Pittston Co., supra, 186 Va. at page 337, 42 S. E. 2d at page 275.

By an emergency act which became effective on March 31, 1944, Acts 1944, ch. 367, pp. 523, 528-532, section 3822, as amended, was divided into two sections; section 3822, dealing with the manner of consolidation or merger, and section 3822-a, dealing with the remedy of dissatisfied stockholders, which relates to the matter with which we are now concerned.

Section 3822-a is now embodied in the Code of 1950 as sections 13-47 to 13-54, both inclusive.

Neither the emergency act of 1944, nor the provisions as now found in the Code of 1950, made any material change in the particular provisions of the statute with which we are now concerned. The briefs on both sides refer to the pertinent section as 3822-a, and we will do the same.

Section 3822-a, paragraph (a), provides that any stockholder of a corporation who has not given his assent to the lawful merger of his corporation with another, may by following the prescribed procedure, receive from the consolidated or merged corporation "the fair cash value of his stock as of the day before the vote for the agreement of consolidation or merger of his corporation was so cast." Code, § 13-47.

Paragraph (b) of the section provides that if the dissenting stockholder and the merged or consolidated corporation are unable to agree upon "the fair cash value of his stock, as of the date" aforesaid, either he or the merged corporation, upon reasonable notice to the other, may apply to a specified court, or to the judge thereof in vacation, to have "the fair cash value of his stock, as of the date aforesaid," determined by three disinterested appraisers appointed by the court. Code, § 13-48.

Paragraph (c) provides that the appraisers so appointed, after investigation, shall report to the court, or the judge thereof in vacation, as promptly as possible, "the fair cash value of the stock of the dissenting stockholder as of the day" aforesaid. Code, § 13-49.

Paragraph (d) provides that if such stockholder or the consolidated or merged corporation be dissatisfied with "the fair cash value as determined by the appraisers," he or it may apply to the court, or to the judge thereof in vacation, to set aside the finding of the appraisers. If the court or judge be of opinion that the "valuation is just", it or he shall deny the application and "shall confirm" "the report of the appraisers" "and the amount thereof". In case of such confirmation the amount fixed by the appraisers "shall immediately become and be a final judgment of the court against the consolidated or merged corporation and may be collected as other judgments of a court of competent jurisdiction are by law collectible." Code, § 13-50.

If the court or judge be of opinion that the valuation is not just, the report of the appraisers shall be set aside and the court or judge "shall proceed to ascertain the fair cash value of the stock of such stockholder, as of the day aforesaid, and shall enter judgment against the consolidated

or merged corporation accordingly, which judgment may be collected as other judments of a court of competent jurisdiction are collectible." Code, § 13-50.

Paragraph (e) of the section provides that, "Upon payment or tender of payment by the consolidated or merged corporation of the value of the stock so ascertained, the dissenting stockholder shall deliver up to his certificate of stock * * * and shall mark the judgment satisfied". If the dissenting stockholder refuses to deliver the stock and mark the judgment satisfied upon such tender, then the corporation may deposit to the credit of the court in which the proceeding is pending "the value of the stock so ascertained and determined," and the court or judge "shall enter an order reciting the deposit and declaring the judgment satisfied". Code, § 13-51.

This paragraph further provides that, "Thereafter the rights of the stockholder under his stock in the consolidating or merging corporation shall cease and determine and his sole right shall be to receive the cash so deposited upon surrender" of his certificate or certificates of stock.

From this analysis it is plain that the statute makes no provision for the allowance of interest to the dissenting stockholder on the ascertained fair cash value of his stock either by the appraisers or by the court in its entry of judgment. Whether the court adopts the valuation of the appraisers, or itself fixes such valuation, it is authorized to enter judgment only for the ascertained fair cash value as of the specified time.

When the consolidated corporation pays or tenders to the stockholder "the value of the stock so ascertained", it is entitled to receive the stock and the stockholder is required to deliver it to the corporation.

Similar statutes are found in other States, and with the two exceptions [5] to which we shall later refer, the courts have uniformly held that in such a statutory appraisal proceeding the dissenting stockholder is not entitled to receive from the merged corporation interest on the ascertained

[5] Skipwith v. Federal Water & Gas Corp., 185 Misc. 248, 56 N.Y.S. 2d 804; Tobacco Products Corp. v. Plummer, Chancery Court of the city of Richmond, 1933 (unreported).

fair cash value of his stock from the effective date of the merger. See Meade v. Pacific Gamble Robinson Co., Del., 58 A.2d 415, affirming Del. ch., 51 A.2d 313; In re Janssen Dairy Corp., 2 N.J.Super. 580, 64 A.2d 652; American General Corp. v. Camp, 171 Md. 629, 190 A. 225; In re Erlanger, 237 N.Y. 159, 142 N.E. 571.[6]

These decisions are grounded on the following principles with which we are in accord:

[1] (1) The proceeding is statutory in nature and the court sits as a special tribunal with the limited powers granted to it by the statute. Where the statute does not provide for interest the court has no discretion to award interest. Meade v. Pacific Gamble Robinson Co., supra, 58 A.2d at page 418; In re Janssen Dairy Corp., supra, 64 A.2d at page 654.

[2] (2) The act of a corporation in merging with another is not a tort or a legal wrong which violates the rights of a dissenter and entitles him to interest within the discretion of the court, or under the interest statute. Code, § 8-223. The merger is effected under full authority of the statute which is an essential part of the contract between the corporation and its stockholders.[7] Meade v. Pacific Gamble Robinson Co., supra, 58 A.2d at pages 417, 418; In re Janssen Dairy Corp., supra, 64 A.2d at page 654.

[3] (3) The merger of a corporation in which the dissenting stockholder owns stock with another does not constitute a "taking" of the stock of the dissenter in the sense of a condemnation proceeding. In a merger there is no taking of the dissenter's stock without his consent. Under the terms of the statute, which is a part of his contract, he has the election to retain his stock in the consolidated corporation or to accept the fair cash value thereof. There is no compulsion on him to choose one course rather than

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[6] Since the New York and Maryland decisions the legislatures of those States have amended their statutes to provide for the payment of interest. See, In re Janssen Dairy Corp., supra, 64 A. 2d at page 655, for a reference to these statutes.

[7] That such statute is a part of the contract between the corporation and its stockholders, see Adams v. United States Distributing Corp., supra, 184 Va. at page 149, 34 S. E. 2d at page 251, and authorities there cited.

the other. If he elects not to remain with the merged corporation, he surrenders his stock in return for the fair cash value thereof pursuant to the terms of his contract with the corporation. Meade v. Pacific Gamble Robinson Co., supra, 51 A.2d at pages 317, 318; In re Erlanger, supra, 142 N.E. at page 573.

[4] (4) In any event, interest cannot be awarded until the stockholder's claim against the corporation becomes liquidated upon the ascertainment of the fair cash value of his stock. American General Corp. v. Camp, supra, 190 A. at pages 230-231.

[5] The principle that the provisions of the merger statute are a part of the contract between the corporation and the dissenting stockholder disposes of the contention of the appellee dissenters that they are entitled to interest by virtue of the interest statute. Code, § 8-223. This statute provides that, "In any suit in equity, or in an action or motion founded on contract, when no jury is impaneled, decree or judgment may be rendered for interest on the principal sum recovered, until such decree or judgment be paid; * * *." This statute, of course, does not contemplate or permit the allowance of interest in the decree or judgment contrary to the terms of the contract between the parties.

In Skipwith v. Federal Water & Gas Corp., 185 Misc. 248, 56 N.Y.S. 2d 804, a lower New York court, interpreting the Delaware merger statute, held that interest should be allowed as a matter of "simple justice." However, the highest court of Delaware, in the Meade Case, supra, interpreting its own statute, expressly rejected the holding and reasoning in the Skipwith Case. See 58 A. 2d at page 418. The holding in the Skipwith Case was likewise rejected in Re Janssen Dairy Corp., supra, 64 A. 2d at pages 655, 656.

In the recent case of City of Richmond v. Henrico County, 185 Va. 176, 37 S.E. 2d 873, we dealt with a question which is strikingly similar to that now before us. That case involved the proper interpretation of section 5222k of Michie's Code of 1942, Acts 1924, p. 713, which in substance provided that a city annexing a subdivision should pay to the owners of such subdivision the "fair value," as of the

date of annexation, of the public improvements and utilities constructed by the owners in such subdivision. Provision was made for the appointment of appraisers, in event of disagreement, to ascertain and report to the court such "fair value."

The city and the owners being unable to agree, appraisers were appointed and instructed to ascertain and report the "fair value" of the improvements as of the date of annexation. The trial court confirmed some of the appraisers' findings, but set aside others and made new findings of "fair value." It also awarded interest on the ascertained "fair value" of such improvements from the effective date of the annexation. In reversing that judgment with respect to the allowance of interest, we there said what is pertinent here:

"* * * The statute, which is alone the source of any recovery, does not provide for the payment of interest and consequently the appraisers' awards do not bear interest, certainly until the awards become a finality which, in the absence of adjustment, cannot be until the matter has run the gamut of the courts. Until such event, the claim is unliquidated. There would be no sum certain upon which interest could be computed.

"It was said in the case of Stearns v. Mason, 65 Va. 484, 494, 24 Gratt. 484, 494: 'This court has repeatedly held that when accounts were unliquidated and disputed between the parties, interest ought not to be allowed.'

"After citing a number of cases in support of the above statement, the court said further: 'These cases show that the court ought not to allow interest when the claim, though just, is doubtful, or where the amount is unliquidated and uncertain.'

"Section 6259 of the Code of Virginia, known as the interest statute, has no application to this case.

"This is not an action on contract or for tort, nor is it a suit in equity, all of which processes are subjects of that section.

"This is a proceeding by way of petition, for the appointment of appraisers to do a specific thing, namely, to determine the fair value of certain utilities as of a certain time.

It is purely statutory and the end to be attained is rather ideal until it becomes actual through the processes of the statute. Fair value, in our notion of the statutory intendment, is, when ascertained, a sum certain, definite and fixed. If that sum is augmented by the addition of interest or anything else it is more than fair value and so more than the statute allows." 185 Va. at pages 199, 200, 37 S.E.2d at pages 884, 885.

While the statute involved in the City of Richmond v. Henrico County Case was not a part of the contract between the parties, as is the situation in the case now before us, the cases are identical in that the language of each statute negatives the allowance of interest on the "fair value" in one case, or the "fair cash value" in the other, prior to the date of the ascertainment of such value.

According to the briefs now before us the lower court was of opinion that under the principles announced in Tobacco Products Corp. v. Edward T. Plummer, decided by Judge Moncure in the Chancery Court of the city of Richmond in 1933 (opinion not reported), and in which we refused an appeal without opinion on January 22, 1934, 161 Va. XVII, it was bound to allow interest to the appellee dissenters on the fair cash value of their stock from the effective date of the merger.

We have re-examined the record and opinion in the Tobacco Products Case and agree that what was said in that opinion supports the view of the lower court with respect to the allowance of interest in the present case. But we are of opinion that the present case should not be disposed of upon the holding in that case.

The Tobacco Products Case did not involve the merger of corporations under Code, § 3822-a, or its predecessor, § 3822. It involved the rights of stockholders in one corporation who did not assent to the sale of its entire assets to another corporation. That situation was governed by the terms of Michie's Code of 1930, § 3820-a. Code of 1950, §§ 13-83 to 13-86. The latter section provided that in case of such sale a dissenting stockholder should have the same right as a stockholder who dissented from a corporate merger, and that the same procedure should be followed to ascertain the

fair cash value of the dissenter's stock "as now or may be hereafter provided by statute in case of such stockholder of a merged or consolidated corporation *and/or as now exists under the general law* * * *." (Italics supplied.)

We held in Craddock-Terry Co. v. Powell, 181 Va. 417, 443, 25 S.E.2d 363, 374, that the italicized words evinced a legislative intent that the statutory remedy afforded to a stockholder who dissented from such sale was not to be exclusive, and that such dissenter might pursue his equitable remedy as well. See also, Adams v. United States Distributing Corp., supra, 184 Va. at page 147, 34 S.E.2d at page 250.

According to the opinion in the Tobacco Products Case, the chancellor thought that the merger statute likewise did not provide the exclusive remedy for dissenting stockholders. Accordingly, he reasoned that the rights in a merger case, as well as in a sale of assets case, were the same and should be decided on equitable principles which permitted the allowance of interest, as a matter of "simple justice," on the ascertained fair cash value of the dissenter's stock from the date of the sale or the effective date of the merger.

[6] But, as we pointed out in Adams v. United States Distributing Corp., supra, 184 Va. at page 147, 34 S.E.2d at page 250, the rights of the dissenting stockholders in the two cases are not identical. In the case of a merger there is no preservation to the dissenter of his "original equitable remedy," but his rights are governed entirely by the statute.

In so far as what was said in the Tobacco Products Case may conflict with our later holding in City of Richmond v. Henrico County, supra, and with the principles enunciated in the case now before us, it is hereby disapproved.[8]

[7] This court is not concerned with whether a dissenting stockholder, as a matter of "simple justice" or under equitable principles, is entitled to interest on the fair cash value of his stock from the effective date of the merger. It is for the legislature and not for the courts to say upon what

[8] The holding in the Tobacco Products Case was considered and expressly disapproved in Meade v. Pacific Gamble Robinson Co., supra, 58 A. 2d at page 418.

terms the consolidated or merged corporation should settle its differences with a dissenting stockholder. Our function is to construe the statute as written. In discharge of that function we hold that under the statute, as we interpret it, a dissenting stockholder is not entitled to interest on the ascertained value of his stock from the effective date of the merger.

The appellee members of the Adams-O'Hara group contend that The Pittston Company is estopped under either the doctrine of *res judicata* or the law of the case, or under the doctrine of inconsistent position, from denying on this appeal its liability for interest on the ascertained fair cash value of their stock from the effective date of the merger. Neither of these positions, in our opinion, is sound.

With respect to the claim of *res judicata* or law of the case, the appellee dissenters say that the lower court, in its decrees of December 6, 1944, and April 16, 1946, adjudicated that The Pittston Company should pay interest on the ascertained fair cash value of the stock "of all of the dissenters," and that that company did not appeal from such adjudication.

[8, 9] This argument overlooks two fundamental essentials in the application of the doctrine of *res judicata:* (1) It applies only to parties to the proceeding and their privies; and (2) The estoppel must be mutual. If one who asserts the estoppel was not a party to the prior proceeding and is not bound by the judgment relied on, the adverse party is likewise not bound. See Freeman on Judgments, 5th Ed., Vol. 1, § 428, p. 929 *ff*; Anderson v. Sisson, 170 Va. 178, 182, 196 S.E. 688, 689; Unemployment Comp. Comm. v. Harvey, 179 Va. 202, 210, 18 S.E.2d 390, 393.

[10] As has already been said, on the second appeal we reversed the decree of April 16, 1946, on the ground then asserted by the Adams-O'Hara group that its effect was to bind them by the first appraisal proceeding, which culminated in the decree of December 6, 1944, to which these dissenters were not parties. Hence, we said, the latter decree was not *res judicata* as to or binding on these dissenters. O'Hara v. Pittston Co., supra. It necessarily follows that in so far as their rights are concerned, it likewise does not

so operate against their adversary, The Pittston Company.

[11] Moreover, the decree of April 16, 1946, which adjudicated that The Pittston Company must pay the appellee dissenters $55 per share for their stock with interest, and upon which they here rely, was at the instance of these dissenters "reversed and annulled," according to the terms of our mandate. O'Hara v. Pittston Co., supra. Having been reversed, the decree was no longer operative as *res judicata* or the law of the case in favor of or against any of the parties. Freeman on Judgments, 5th Ed., Vol. 2, § 720, p. 1521 *ff*; 50 C.J.S., Judgments, § 625, pp. 50-51; 50 C.J.S., Judgments, § 702, pp. 157-158.

[12, 13] The claim of the appellee dissenters that The Pittston Company is estopped by its prior conduct to deny liability for such interest is based on these circumstances:

(1) It acquiesced in the decree of December 6, 1944, ordering the payment of interest from the effective date of the merger on the fair cash value of the stock of other dissenters. It subsequently undertook to hold the members of the Adams-O'Hara group to these terms and acquiesced in the decree of April 16, 1946, which had that effect.

Since we held on the second appeal, O'Hara v. Pittston Co., supra, that the Adams-O'Hara dissenters were not parties to the first appraisal which culminated in the decree of December 6, 1944, allowing interest to the other dissenters, the position of The Pittston Company with respect to the entry of that decree does not work an estoppel against it in this, the second appraisal proceeding.

The doctrine of estoppel by inconsistent position does not apply to a prior proceeding in which the parties are not the same. 19 Am. Jur., Estoppel, § 73, p. 711; 31 C.J.S., Estoppel, § 117, p. 372 *ff*.

In its unsuccessful effort to hold the members of the Adams-O'Hara group to the terms of the decree of December 6, 1944, The Pittston Company took no position with reference to its liability for interest as such. It claimed that under our opinion on the first appeal, Adams v. United States Distributing Corp., supra, the members of the Adams-O'Hara group were entitled to receive precisely what the lower court had adjudicated that the other dis-

senters were entitled to receive. Identity of treatment of the Adams-O'Hara group, as measured by what had been paid to the other dissenters, precluded The Pittston Company from taking the position that it was not bound to pay interest to the later group.

Indeed, the lower court announced in its opinion that the decree of April 16, 1946, holding the members of the Adams-O'Hara group to the terms of the decree of December 6, 1944, was based upon such identity of treatment. It differed with The Pittston Company's application of the principle only to the extent that it allowed interest to the date of payment, whereas The Pittston Company had insisted that interest should stop running on October 22, 1944, as in the case of the other dissenters.

Not until after our opinion on the second appeal, in which we reversed the decree of April 16, 1946, O'Hara v. Pittston Co., supra, was it made clear to these litigants and the lower court that the members of the Adams-O'Hara group were not bound to receive precisely what the other dissenters had gotten as the result of the first appraisal.

[14, 15] (2) Next, it is said, in its original answer to the petition of the members of the Adams-O'Hara group for a new appraisal, The Pittston Company took the position that it was liable for interest from the effective date of the merger until October 22, 1944, and not until its amended answer was filed did it take the position that it was not liable for interest prior to the date of the judgment confirming the appraisal and fixing the fair cash surrender value of the stock.

This change of position in the pleading of The Pittston Company was with respect to a question of law and was made before the appraisers' report had been acted on. A person who has taken an erroneous position on a question of law is ordinarily not estopped from later taking the correct position, provided his adversary has suffered no harm or prejudice by reason of the change. Spandorfer v. Cooper, 141 Va. 792, 799, 800, 126 S.E. 558; 31 C.J.S., Estoppel, § 117, pp. 372, 373, and cases there cited.

Here there is no showing that the Adams-O'Hara dissenters were in any way prejudiced by this change of posi-

tion on the part of The Pittston Company in its pleading. They say in their brief that "had Pittston assumed this position before the appraisal, the Adams-O'Hara group could have urged that the appraisers' award include interest."

The ready answer to this contention is that under the statute and the order appointing the appraisers, they were authorized to determine "the fair cash value of the stock" as of the effective date of the merger. It was no concern of theirs nor within their province to determine whether interest should be paid on such value after that date.

[16, 17] (3) Finally, it is said, in its settlement with other dissenting stockholders The Pittston Company paid interest on the value of the stock from the effective date of the merger.

We know of no principle of law which holds that a party who settles with an adversary on certain terms in one proceeding is bound to settle upon the same terms with other parties in another proceeding, even though the litigation in the two instances may have arisen out of the same subject-matter.

For these reasons the decree appealed from is reversed and the cause remanded for the entry of a proper decree in accordance with the principles here announced. The appellant, The Pittston Company, will recover its costs expended on this appeal.

Reversed and remanded.

HUDGINS, Chief Justice (dissenting).

It is with deference that I dissent from the opinion of the majority, and submit herewith some of the controlling reasons therefor.

The only question presented is whether holders of minority stock who dissented from a merger of two corporations are entitled to interest on the fair cash value of their stock from the date of merger, or from the date of the judgment on the appraisers' report.

In my opinion this is not an open question in Virginia. To substantiate this conclusion, I am citing below decisions of this court and other authorities indicating that pursuant

to the former construction of the merger statutes, dissenting stockholders were entitled to receive interest on the fair cash value of their stock from the date of the merger until paid.

The pertinent language of the statutes, Sections 3820a and 3822 of Michie's 1942 Code, that governs the decision in this case was construed in Tobacco Products Corporation v. Edward T. Plummer. While the writ of error in the Plummer case was refused, the able opinion written by the late William A. Moncure, Judge of the Chancery Court of the City of Richmond, was approved by this court.

In June, 1932, the minority stockholders of the Tobacco Products Corporation proceeded under the sale and merger statutes to have the fair cash value of their stock ascertained. The appraisers in their report fixed the fair cash value at $11.00 a share as of February 10, 1932, the date of the merger. The learned chancellor, in affirming their report, allowed interest from the date of the merger, or sale of the corporate assets. The pertinent parts of Judge Moncure's opinion are quoted below. He states the precise question thus:

"Does the $11 share value carry interest from February 10, 1932, or does it only carry interest from the judgment of the Court established (ing) that value?

"It is contended on behalf of the Corporation that Section 3822 of the Code of Virginia does not provide that the award shall bear interest, but in effect expressly provides what the dissenting stockholder shall receive, when it says, he 'shall be entitled to receive from the vendor corporation the fair cash value of the stock as of the day before the sale of all of the assets of said corporation was authorized by the written consent of the holders of two-thirds of all its issued and outstanding stock.' And that the statute provides for the appointment of three appraisers whose duty it is to investigate the condition of the corporation and report to the Court, 'the fair cash value of the stock of such dissenting stockholders as of the day before the sale of all of the assets of said corporation was authorized by the written consent of the holders of two-thirds of all its issued and outstanding stock.' Then counsel for the Corporation points out that

the statute provides that, 'the court if of opinion that the valuation is just shall confirm the same and the amount thereof. And in any case in which the report of the appraisers is confirmed as hereinabove directed, the amount thereof shall immediately become and be a final judgment of the Court against the vendor corporation and may be collected &c.' Then it is contended in behalf of the Corporation that even if the language of Section 3822 does not expressly negative the right of dissenting stockholders to interest prior to confirmation the language should be so construed under the settled principle that interest cannot be allowed upon an unliquidated demand. * * *

"Counsel for the Corporation cite the following cases as directly establishing his contention against the allowance of interest: Matter of Erlanger, 237 N. Y. 159, 142 N. E. 571; Matter of Trask v. Peekskill &c., 6 Hun. 236; Shields v. Anderson, 3 Leigh, 729.

"Frankness compels me to admit that the Erlanger case appears to be authority for his claim against the allowance of interest until from the judgment of the Court on the award. On the other hand, the Trask case seems to be authority for the allowance of interest only from the report of the appraisers.

"The language of the New York statutes concerning corporations are not identical with the statutes on the subject in Virginia, and as the liberal policy in Virginia, Section 6259 of the Code of Virginia, authorizes the allowance of interest in certain enumerated cases, the New York cases ought not to be binding, if the equity and justice of the situation justify the conclusion that the dissenting stockholders should have interest allowed at an earlier date than allowed by the Erlanger case, and the Trask case.

"The report of the appraisers fixed the value of the stock as of February 10, 1932, at $11.00 the share and then added that they, 'Did not take into consideration the lapse of time since that date, but assumed that interest at six per centum per annum would run on the award from February 10, 1932.'

"The appraisers recognized, no doubt, the justice of the right of the dissenting stockholders to receive interest from February 10, 1932 and would have made the report carry

interest from that date, but for the language of the Court order of their appointment.

"Every stockholder has an inherent interest in the assets and property of the Corporation in proportion to the number of his shares of stock. If the Corporation is dissolved he has a like property right in the assets and property of the dissolved corporation, and may demand such share in distribution.

"If a stockholder is a dissenter, and the corporate property is sold, he does not lose his property right, that property right, whether legal or equitable, should remain his until its value is paid to him.

"Such dissenter has the right under Sections 3820a and 3822 Code of Virginia to proceed to have the value of his property right ascertained and paid to him; but there is, I think, reserved to him (the right) under general law to go into equity and have his property right valued and paid to him.

"In speaking of the summary remedy given by statute to a dissenting stockholder in the case of Winfree v. Riverside Cotton Mills, 113 Va. [717] at page 724 [75 S. E. 309], it is said: 'While this summary remedy is given by a statue, and the appellant might have pursued it, he was not bound to do so. Although the consolidating statute took away from him the right to defeat the consolidation by refusing to consent to it, it did not take away from him the right to refuse to surrender his stock for stock in the new corporation, or refuse to take anything for it less than its actual value at the date of the consolidation.' The demurrer to the bill in the Winfree case was therefore overruled.

"Is it justice that a dissenting stockholder whose property right remains until its value is ascertained and paid to him, be paid only the value of his stock as of the date of sale, without interest, notwithstanding the intervening time between the sale and payment for his stock, the large part of the property sold has at all times yielded large amounts in rental revenue?

"I do not think that would be justice. * * *

"If the dissenting stockholders had filed a bill in equity to have their rights fixed, the value of their stock ascertained

and decreed them, can it be said that the Court would have no right and power to consider the lapse of time since February 10, 1932, in determining the amount to be paid the dissenting stockholders?

"I think the Court would have such power. I do not think that the summary remedy given a dissenting stockholder as provided by statute was intended, or should be construed as diminishing the amount he should receive if he were in a court of equity.

* * * * * * *

"Just here it may not be inappropriate to make another quotation, in Miller v. Robertson, 266 U. S. [243] at page 258 [45 S. Ct. 73, 69 L. Ed. 265], it is said, 'One who has had the use of money owing to another justly may be required to pay interest from the time payment should have been made. Both in law and in equity interest is allowed on money due. Spalding v. Mason, 161 U. S. 375 [16 S. Ct. 592, 40 L. Ed. 738]. Generally interest is not allowed on unliquidated damages. Mowry v. Whitney, 14 Wall 620 [20 L. Ed. 860]. But where necessary to arrive at fair compensation, the court in the exercise of a sound judicial discretion may include interest, or its equivalent, as an element of damage.'

"In Minors Institute, Vol. 4 part 1-pp. 819-21 after stating the common law rule on the allowance of interest, says, 'Our courts in Virginia, with some aid from the legislature have long established a different doctrine; namely, that it is natural justice that he who has the use of anothers money should pay interest on it. * * *' The growing favor of allowing interest in Virginia as a result of legislation is shown if provision on the subject in Code of 1819 page 508 is compared with the provisions of the Code of 1849.

"By the Code of 1849 interest in tort cases was for the first time permitted.

"A further comparison of the Code of 1849 with the Code of Virginia 1919 shows that this favorable attitude in the allowance of interest continued to grow.

"Section 6259 Code of Virginia, 1919, permits the jury in any case to fix the time from which interest shall run; and the section further provides, 'In any suit in equity, or in an

action or motion founded on contract, where no jury is impaneled, decree or judgment may be rendered for interest on the principal sum recovered, until such decree or judgment is paid.'

"The next consideration is, does this obligation to pay the dissenting stockholders the fair cash value of their stock as of February 10, 1932, arise out of contract, or does it arise as a tort.

"If the dissenting stockholders right arose as a tort, then there was a conversion, and it seems that in all cases of conversion, interest runs from the time of the conversion.

"Fletcher on Corporations, Section 5120, says, 'Generally the plaintiff is entitled to interest on the value of the stock from the time of the conversion to the time of the verdict.'

"Doyle v. Burns, 123 Iowa, 488 [99 N. W. 195], says, 'With reference to the conversion of property in general, we have heretofore adhered to the rule announced by the great, weight of authority that the measure of damage is the value of the property at the time of the conversion, with interest.' In Vance v. [W. A.] Vandercook Co., 170 U. S. [468] at page 480 [18 S. Ct. 645, 42 L. Ed. 1111], Mr. Justice White stated the rule to be, 'The general rule of damage is the value of the property taken, with interest from the time of the taking down to the trial.' To the same effect are these cases: Arkansas Valley Co. v. Mann, 130 U. S. 69 [9 S. Ct. 458, 32 L. Ed. 854], Jones v. Missouri-Edison Co. [8 Cir.], 233 F. 49; Pittsburg Gas Co. v. Pentress [Gas] &c., 84 W. Va. 449, 8 Ruling Case Law, page 537 and note.

"From the authorities just cited it may be stated that the law is, in case of conversion, the person whose property is converted is entitled to recover the fair cash value of the property at the time of the conversion with interest at the established rate from the date.

"What the majority stockholders did was, they lawfully appropriated the dissenting stockholders property to their own and expressed purpose. And the law gives the minority stockholders the right to be paid just compensation for their property thus lawfully appropriated.

"Whether the stock is tortiously taken, or taken under the statute, in either case it is taken against the will of the

minority stockholder, the dissenter, and it seems to me that the value of the property, just compensation, should be the same in each case.

"Now this question presents itself, is not the duty to pay the dissenting stockholders for the value of their stock, a duty founded on contract?

"I think it is.

"In the case of Winfree v. Riverside Cotton Mills, 113 Va. at page 717 [75 S. E. 309], Judge Buchanan in stating the status of the corporation whose charter was amended after the present constitution became effective, said, 'The charter which is to be so held is not only a contract between the State and the corporation, but is also a contract between the state and the stockholders, the corporation and the stockholders, and between the stockholders themselves.'

"Therefore, in like manner, the charter of Tobacco Products Corporation, the chart by which the stockholders conducted their undertakings and paid for their stock, was a contract between the corporation and the stockholders, and between the stockholders themselves.

"The two-thirds majority met and agreed upon what they would do; passed resolutions to that effect; among the things they agreed to do were to sell the assets, and dissolve the corporation. In doing this they agreed to dissolve this existing contract between the stockholders. The liability to the dissenting stockholders certainly was founded by reason of this breach of contractual relation.

"Among the things necessary and required by law in carrying out this dissolution of the stockholders contractual relation was the payment to the dissenting stockholders a fair cash value for their stock, and I think this was a contractual duty and undertaking. Section 6259, Code of Virginia, provides,

" 'In any suit in equity or in an action or motion founded on contract, where no jury is empaneled, decree or judgment may be rendered for interest on the principal sum recovered.'

"Therefore, exercising that discretion which I think the situation demands, and the law authorizes, it is my opinion that the petitioning stockholders of Class A stock should

receive therefor $11.00 the share with interest thereon at the rate of six per centum the year, from the 11th day of February 1932 (that being the day their property was sold and thereby appropriated to the use of the majority)."

The judgment of this court refusing the appeal was entered on the 22nd day of January, 1934, and was in the following language:

"The petition of the Tobacco Products Corporation of Virginia for an appeal from and supersedeas to a decree entered by the Chancery Court of the city of Richmond on the 10th day of October, 1933, in a certain chancery cause then therein depending herein Edward T. Plummer and others were plaintiffs and the said petitioner was defendant, having been maturely considered and transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject the said petition, the effect of which is to affirm the decree of the said chancery court."

I have adopted the unusual course of quoting at length from the opinion of Judge Moncure and the order of this court refusing to review the case in order to remove all doubt of the fact that the same argument advanced in this case against the allowance of interest from the date of the merger was advanced in the Tobacco Products Corporation case and was rejected by unanimous vote seventeen years ago.

In 21 V. L. R. p. 825, Judge Moncure's opinion in this case was discussed at length, and additional reasons were given for approval of what is there referred to as the "Virginia Doctrine." The article concludes as follows: "The instant decision, therefore, appears to be eminently sound in holding that the stockholder becomes a creditor of the corporation as of the appraisal date, and that the obligation bears interest from that time."

The case of City of Richmond v. Henrico County, 185 Va. 176, 37 S.E. 2d, 873, is relied upon to support the argument set forth in the majority opinion. In my opinion the facts in that case are dissimilar to the facts in this case. There

the court was not dealing with a right arising under a contract, but a right created by statute; hence the court applied elementary principles and strictly construed the statute creating the right.

In the case now under consideration we are dealing with a contractual right. At least it grows out of contractual relations and, without the statute, these rights would be protected in a court of equity.

The reasons advanced to support the conclusion of the majority is not in accord with the former decisions of this court, or with its construction of legislative enactments dealing with the subject. This is particularly true of that part of the opinion in which it is said: "This court is not concerned with whether a dissenting stockholder, as a matter of 'simple justice' or under equitable principles, is entitled to interest on the fair cash value of his stock from the effective date of the merger. It is for the legislature and not for the courts to say upon what terms the consolidated or merged corporation should settle its differences with a dissenting stockholder."

Prior to the decision in Adams v. U. S. Distributing Corp., 184 Va. 134, 34 S.E. 2d 244, 162 A.L.R. 1227, the general rule was that a dissenting stockholder had the choice of one of two remedies by which he could enforce his rights—that is, he could invoke the plenary powers of a court of equity, or he could proceed under the statute.

I voted for that opinion because I thought that by so doing it would avoid the possibility of a multiplicity of suits in different forums and would render the administration of justice more orderly and expeditious. In so doing, I relied upon the views expressed by Judge Moncure in the Tobacco Products Corporation case, to the effect that the statutory remedy was not intended to, nor would, be construed as diminishing the amount such stockholders would receive if the right to apply to a court of equity had been preserved.

The original merger statute, Acts 1902-3-4, p. 437, has been amended and readopted several times. Acts 1922, p. 625; Acts 1944, p. 528. However, it is to be noted that there has been no substantial change in the pertinent language declaring that the dissenting stockholders "shall be entitled

to receive from the consolidated or merged corporation the fair cash value of his stock as of the day before the vote for the agreement of consolidation or merger of his corporation was so cast as aforesaid, which fair cash value if not agreed on between the dissenting stockholder and the consolidated or merged corporation shall be determined in the manner" prescribed.

This was the language construed by Judge Moncure in the Tobacco Products Corporation v. Edward T. Plummer, and by this court in Craddock-Terry Co. v. Powell, 181 Va. 417, 25 S.E. 2d 363, 380. In the latter case the trial court decided that interest should not begin to run until a year after the consolidation, or sale of the corporate property. In modifying that decree, we said: "interest will be allowed on the total amount of recovery from January 23, 1939, *the date the old corporation transferred the assets to the new corporation*, instead of January 23, 1940." (Italics supplied.) This modification was made under the belief that this court was committed to the doctrine that interest should be allowed the dissenting stockholders from the date of consolidation, or sale, as was held in the Plummer case. It is true that this particular point was not stressed in the briefs, but after the opinion was rendered, an elaborate petition for re-hearing was filed, in which this particular point was argued at length. This court, after careful consideration of the petition refused a rehearing.

Judge Burks stated in Kelly v. Trehy, 133 Va. 160, 112 S.E. 757, 759, that "Under well-settled rules of construction, 'when a statute has been construed by the courts, and is then re-enacted by the Legislature, the construction given to it is presumed to be sanctioned by the Legislature, and therefore becomes obligatory upon the courts.' Mangus v. McClelland, 93 Va. 786, 22 S.E. 364; Draper v. Commonwealth, 132 Va. 648, 111 S. E. 471."

In the same opinion Judge Burks invoked the doctrine which should be controlling in this case, namely: "It is to the interest of the public that there should be stability in the laws by which they regulate their conduct. * * * the construction of statutes ought not to vary with every change in the personnel of the appellate court * * *."

The former construction of the pertinent language of this statute was fair, reasonable and made after careful consideration. The learned chancellor who decided this case in the lower court relied upon the former construction in allowing interest from the date of merger. The failure of the majority to adhere to former decisions of this court will work a great hardship upon appellees, and, indeed, will penalize them for asserting their rights in the lower court and in this court. Every dissenting stockholder, except appellees, has received interest on the fair cash value of his stock since December, 1942, to different dates of payment. The merged corporation has had the use of appellees' money ($41,580.00) since 1942, and, by order of the majority, will not be required to pay anything for nine years' use of it.

Gregory, J., concurs in this dissent.

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FILED
JUN 14 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 116

MAX W. WINN AND SAMUEL BLOOM,
Appellants,

against

THE PITTSTON COMPANY,
Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 116

MAX W. WINN AND SAMUEL BLOOM,

Appellants,

against

THE PITTSTON COMPANY,

Appellee.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND APPELLEE'S MOTION TO DISMISS OR AFFIRM.

The Pittston Company, Appellee in the above entitled cause, for its statement in opposition to appellants' statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm respectfully shows the following:

1. Factual Statement

On January 1, 1943, The Pittston Company merged with United States Distributing Corporation, a Virginia corporation, pursuant to the merger laws of that State. Appellants constitute a group of dissenting stockholders of the latter corporation, who duly noticed their objection to the proposed merger and thereupon, under § 3822-a of the

Virginia Code,[1] became entitled to an appraisal of the "fair cash value" of their holdings "as of the day before the vote for the agreement of consolidation or merger" (§ 3822-a [a]). After appellants unsuccessfully had attempted to proceed in equity rather than under the merger statute (see *Adams* v. *U. S. Distributing Corp.*, 184 Va. 134, 34 S.E. [2d] 244, cert. den. 327 U.S. 788) and they refused to abide by the $55 per share awarded by the appraiser in 1944 to the other dissenters in the blanket appraisal proceeding in which appellants would not participate (*O'Hara* v. *Pittston Company*, 186 Va. 325, 42 S.E. [2d] 269), new appraisal proceedings were held in 1949, resulting in the determination of $57.75 per share as the fair cash value of appellants' holdings. The Chancery Court, over our opposition, allowed interest from the date of merger until the date of payment. No opinion was filed by the trial judge.

Upon appeal to the Virginia Supreme Court of Appeals, the Chancery Court judgment was reversed by a 3 to 2 decision (two justices not sitting), and remanded for the entry of a judgment modifying the decree by striking therefrom the provision for interest (*O'Hara* v. *Pittston Company*, 63 S.E. [2d] 34).

In a subsequent petition for rehearing, appellants, pointing to the Fourteenth Amendment of the Federal Constitution, sought to invoke § 88 of the Virginia Constitution,[2] as implemented by the Code (§ 8-494), which requires

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[1] In the Virginia Code of 1950, § 3822-a has been recodified as paragraphs 47 through 64 of Title 13 without any change pertinent to the issue herein involved. As § 3822-a has been used throughout this litigation that designation will continue for the purposes of this statement. The Section is printed in full as Appendix A to appellants' jurisdictional statement.

[2] Insofar as pertinent, this section reads: ". . . no case involving a construction of the Constitution of this State or of the United States, shall be decided except by the Court in bank and the assent of at least

the concurrence of four members of the Court in a constitutional decision. The Court refused to reconsider its 3 to 2 decision in this case.

II. The Issue Involved

The sole question is whether the Virginia merger statute, as construed by the highest court of that State to exclude the allowance of interest for any period prior to judgment, effectuates a taking of private property without due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

III. Decision of the Court Below

The opinion of the Court below (per Eggleston, J.), after detailing the pertinent facts and tracing the course of the litigation up to that time, summarizes the provisions of § 3822-a and concludes:

> "From this analysis it is plain that the statute makes no provision for the allowance of interest to the dissenting stockholder on the ascertained fair cash value of his stock either by the appraisers or by the court in its entry of judgment. Whether the court adopts the valuation of the appraisers, or itself fixes such valuation, it is authorized to enter judgment only for the ascertained fair cash value as of the specified time." [63 S.E. (2d) at p. 39]

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four of the judges shall be required for the Court to determine that any law is or is not repugnant to the Constitution of this State or of the United States; and if, in a case involving the constitutionality of any such law, not more than three of the judges sitting agree in opinion on the constitutional questions involved, and the case cannot be determined without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full Court; and in no case where the jurisdiction of the Court depends solely upon the fact that the constitutionality of a law is involved, shall the Court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained. . . ."

The Court noted that, with two possible exceptions distinguished in the opinion, the courts of other states in construing similar statutes had achieved, in all cases by unanimous decisions, the identical result. (See *Meade* v. *Pacific Gamble Robinson Co., Del.*, 58 A. [2d] 415, aff'g., 51 A. [2d] 313; In re *Janssen Dairy Corp.*, 2 N. J. Super. 580, 64 A. [2d] 652; *American General Corp.* v. *Camp*, 171 Md. 629, 190 A. 225; *Matter of Erlanger*, 237 N. Y. 159, 142 N. E. 571.)

The Court found these decisions grounded upon four general principles, three of which involved considerations of state law. The fourth disposed of the contention herein raised:

> "The merger of a corporation in which the dissenting stockholder owns stock with another does not constitute a 'taking' of the stock of the Dissenter in the sense of a condemnation proceeding. In a merger there is no taking of the dissenter's stock without his consent. Under the terms of the statute, which is a part of his contract, he has the election to retain his stock in the consolidated corporation or to accept the fair cash value thereof. There is no compulsion on him to choose one course rather than the other. If he elects not to remain with the merged corporation, he surrenders his stock in return for the fair cash value thereof pursuant to the terms of his contract with the corporation. Meade v. Pacific Gamble Robinson Co., supra, 51 A. 2d at pages 317, 318: In re Erlanger, supra, 142 N. E. at page 573." (63 S. E. [2d] at p. 40.)

In their petition for rehearing addressed to the Virginia Supreme Court of Appeals, appellants put squarely the constitutional point now raised. By denying rehearing the Virginia court held, in effect, that no real constitutional question was involved for if, in their view, such a question were presented, then the Virginia Constitution would have

compelled a rehearing before the full court. (Virginia Constitution, § 88 quoted at note 2.)

IV. No Substantial Federal Question Is Presented by the Attempted Appeal

Appellants would found this Court's jurisdiction solely upon an asserted analogy to condemnation cases wherein condemnors, in accord with accepted constitutional doctrine respecting the fixing of "just compensation" for a "taking" of private property by "state action," are required to grant the condemnee the value of his property at the time of taking, *plus* the value of the use of the property to the date of payment. As a matter of both equity and convenience, interest at a pertinent prevailing legal rate has frequently been adopted and approved as the fair measure of this second item, i. e., the use of the property after appropriation. (See *Jacobs* v. *United States*, 290 U.S. 13, 54 Sup. Ct. 26; *Dohany* v. *Rogers*, 281 U.S. 362, 50 Sup. Ct. 299; *Phelps* v. *United States*, 274 U.S. 341, 47 Sup. Ct. 611; *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299, 43 Sup. Ct. 354; cf. *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 40 Sup. Ct. 518). Thus the judicial definition of "just compensation" expressly combines two separate elements.

In contending that "fair cash value" as used in § 3822-a can only mean "just compensation," in its constitutional sense appellants build their argument upon the theory that a merger works a "taking" of private property in a manner equivalent to condemnation. But a corporate merger under a merger statute does not involve any "taking" of the property of dissenting stockholders (see *Meade* v. *Pacific Gamble Robinson Co.*, 51 A. (2d) 313, 318, aff'd 58 A. (2d) 415; *Matter of Erlanger, supra*, 237 N.Y. at 166.)

By way of simple illustration, if corporation A is merged into corporation B, A's stockholders are offered B stock which represents a continuing interest in the merged assets of A and B. The interests of A's shareholders in the assets of A are not taken from them; their interest in them is continued, and in addition A's stockholders acquire an interest in the assets of B. One can hardly say, under these circumstances, that there is a "taking" from shareholders in the case of a merger.

Although there is no taking, the statute gives the shareholders of a constituent corporation the right to require the merged corporation to pay them the fair value of their shares by following the prescribed procedure. The election, then, in the case of the merger of corporations, is one which the shareholder himself is entitled to make. He can elect to continue his interest in the assets of his corporation via stock ownership in the merged corporation, or he may in effect force the corporation to purchase his shares at their fair value.

Thus, the shareholder is in a completely different position from that of an owner of land whose property is actually taken from him against his will and who has no alternative but to accept payment therefor.

Furthermore, the Virginia merger statute including its appraisal provisions, has been specifically held in an earlier case between these same parties, to be an incident of the contract between stockholders and their corporation. (*Adams* v. *U. S. Distributing Corporation, supra,* [illegible] S.E. [2d] at 251;[3] cert. den. 327 U.S. 788.) Thus § 3822-a merely prescribes for all stockholder contracts a uniform clause

[3] The same result has been reached under other state statutes. See *Meade* v. *Pacific Gamble Robinson Co., supra; Pearson* v. *Clam Falls Cooperative Dairy Association,* 243 Wis. 369, 10 N. W. (2d) 132; *Mayfield* v. *Alton Ry. Gas & Electric Co.,* 198 Ill. 528, 65 N. E. 100, 102; *Beechwood Securities Corp. Inc.* v. *Associated Oil Company, et als.,* 104 F. 2d 537.

declaring in advance the rights of the parties where a merger is contemplated. A dissenting stockholder is privileged thereunder either to abide by the terms of the merger proposed, accept stock in the merged corporation and share in its subsequent fortunes or to release his interest in return for the fair cash value of his holdings. Here appellants, having elected to take the "fair cash value" of their shares at the time of the merger, have received exactly what, under § 3822-a (as a part of the contract they entered into in becoming stockholders) they voluntarily agreed to take in such a case.

Appellants' contention may readily be reduced to an absurdity. If a merger involved a taking of a dissenter's property in the same way as a condemnation proceeding involves a taking of property, then *all* merger statutes would be invalid on the ground that they work a taking of dissenters' property for *private* use without their consent.

Missouri Pacific Railway v. *Nebraska*, 164 U.S. 403, 17 Sup. Ct. 354, cited by appellants, illustrates this point. That case arose when a railroad refused to grant a portion of its right of way—i.e., land privately owned for public purposes—to a group of private individuals for the construction of a grain elevator on the same terms and conditions on which two other private groups had obtained like facilities. Subsequently, a state agency ordered the railroad to grant the location and the State Supreme Court upheld this order. The matter of just compensation for the alleged taking formed no part of the court's consideration of the case, as, in reversing, it was held as follows:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building

> and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." (p. 417)

We must conclude therefore—as did the Court below and other state courts which have considered the question—that a merger statute in no way effects a taking of private property under state authority. (*Beechwood Securities Corp., Inc.* v. *Associated Oil Co., et als.*, 104 F. 2d 537.)

Indeed, it has been held that a merger statute need not provide any payment whatsoever for dissenting shares. (See *Pearson* v. *Clam Falls Cooperative Dairy Association*, 243 Wisc. 369, 10 N.W. [2d] 132; *Mayfield* v. *Alton Ry., Gas and Electric Co.*, 198 Ill. 528, 65 N.E. 100, 102; *Churchill* v. *Frontier Mortgage Corp.*, 219 App. Div. [N.Y.] 643; *Root* v. *York Corporation* [D. Del. 1944] 56 F. Supp. 288, 292. See also 15 Fletcher on Corporations [Perm. Ed.] § 7164.) *A fortiori*, a merger statute need not provide for interest.

V. Conclusion

It is submitted that the Supreme Court of Appeals of Virginia, in construing that state's merger statutes so as to deny interest to appellants on the fair cash value of their holdings has in no way offended the due process clause of the Fourteenth Amendment of the United States Constitution and that, therefore, this appeal presents no substantial Federal question which entitles appellants to invoke the jurisdiction of this Court.

WHEREFORE, The Pittston Company, as appellee herein, respectfully moves that the within appeal be dismissed or,

alternatively, that the judgment and decision of the Supreme Court of Appeals of the State of Virginia be affirmed.

Respectfully submitted,

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No. 116

In the

Supreme Court of the United States

October Term, 1950

E. FRANK O'HARA, ET ALS,
Appellants

vs.

THE PITTSTON COMPANY,
Appellee

Appeal from the Supreme Court of Appeals
Of the State of Virginia

BRIEF ON BEHALF OF APPELLANTS IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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I.

INTRODUCTION

This brief is submitted in reply to the Statement of Appellee Opposing Jurisdiction and Moving to Dismiss or Affirm, filed herein (as permitted by Rule 12, Paragraph 3, and Rule 7, Paragraph 3), upon the asserted ground that no substantial Federal question is presented.

The Court is referred to Appellants' Statement As To Jurisdiction, filed herein, for a full statement of the nature of the case, the questions presented, the statute involved, and

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I.

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The Court is referred to Appellants' Statement As To Jurisdiction, filed herein, for a full statement of the nature of the case, the questions presented, the statute involved, and

the opinions below. The opinions below are also found in 191 Va. 886, 63 S. E. (2d) 34.

The Statement of Appellee *is predicated solely upon the assertion that no substantial Federal question is raised by this appeal. There is no denial,* however, that appeal is the correct method of review here if the constitutional questions involved are substantial. *There is no denial* that the constitutional questions were properly presented and brought before this Court by the appeal papers. *There is no denial* of the technical jurisdiction of this Court as to this appeal under Section 1257(2) of Title 28, United States Code, approved June 25, 1948.

The appellee erroneously asserts that the Virginia Court of Appeals denied the existence of any constitutional issue, when it rejected the Petition for a Rehearing.

One answer is that the correctness of the court's ruling on the constitutional question raised is the issue here to be reviewed. In the next place, under Section 8-500 of the Virginia Code a rehearing can be granted only ". . . if one of the judges who decides the case adversely to the applicant certifies that in his opinion there is good cause for such rehearing." Thus, the rehearing could be granted only by one of the three judges who decided adversely to these dissenters in the first instance; and the Petition for Rehearing was denied, *not by the court itself,* but only by the refusal of any of those three judges who were the majority in the original decision, to certify good cause. The denial of the Petition for Rehearing was thus brought about, as was the original decision itself, by three judges out of seven, a minority of the Virginia Court of Appeals.

The action of Chief Justice Hudgins in granting this appeal clearly indicates that, in his opinion, a Federal question has been presented.

II.

THERE IS A SUBSTANTIAL FEDERAL QUESTION.

The appellee's argument that no substantial Federal question is presented appears to be based principally on the contentions that the corporate merger proceedings involved are not analogous to condemnation proceedings, that there is no taking of property from dissenters and that the dissenters have contracted away any rights they might otherwise have as to interest.

The appellee does not take exception to the dissenters' contentions that the due process clause of the Fourteenth Amendment requires just compensation be paid when property is taken from a person under state action, without his consent, and that this includes two elements, (a) intrinsic or fair cash value as of the time of taking, and (b) interest on the fair cash value from the time of taking to the time of payment. Appellee seems to rest its argument on the assertion that the Fourteenth Amendment is not applicable, because merger proceedings are not the same as condemnation proceedings. Appellee does not assert that these dissenters have received just compensation.

It is not the purpose of this brief, at this time, to argue the merits of whether these dissenters are entitled to interest or not, but it is the purpose of this brief to demonstrate that this case presents a substantial Federal question which should be reviewed by this Court. In support of that purpose, it is urged that merger proceedings, involving the taking of dissenting stockholders' property, do involve rights guaranteed under the Fourteenth Amendment, and these dissenting stockholders have not waived their rights by any conduct of their own.

A.

There Has Been a Taking of Property.

The Appellee attempts to maintain that there has been no taking of property in the corporate merger proceedings in this case. There is no foundation to this contention. Prior to the merger in 1943, these dissenting stockholders in U. S. Distributing were among the owners of the assets of that corporation. Those assets were property. At the time of the merger, those assets were transferred by U. S. Distributing to Pittston. The certificates of stock held by these dissenters represented a part ownership in assets that were taken from them and given to The Pittston Company, which company, following the merger, had complete title to and control of all the assets formerly owned by the stockholders of U. S. Distributing. That was a taking of the assets of the dissenting stockholder.

It is true, of course, that the merger statute provides that U. S. Distributing, on the vote of the majority stockholders, may so take the assets of the dissenters, even though they do not want to go along with the merger. But it is still a taking of their property, and, under the Fourteenth Amendment, they are entitled to just compensation. This includes two items: (a) the intrinsic value of their share of the assets at the time of taking; (b) interest from the time of taking to the time of payment.

The merger statute recognizes this right, and provides a simple method for measuring the intrinsic value at the time of taking, namely, by appraisal. The Virginia Court of Appeals held it thereby eliminated interest. The stockholders' due process right to just compensation, under the Fourteenth Amendment, gives interest. As construed by the Virginia Court, this statute withholds the element of interest, which

is required by the just compensation rule. That makes it unconstitutional.

The right of a dominant majority to enforce a merger over the wishes of a minority is a purely statutory right. In the absence of statute, this cannot be done. The basic right of a dissenting stockholder to prevent a merger is clearly expressed in *Clearwater* v. *Meredith*, 1 Wallace 25, where Justice Davis, speaking for the Supreme Court, made this statement, relating to the rights of Clearwater, a minority stockholder in a consolidation matter:

> "* * * Clearwater could have prevented this consolidation had he chosen to do so; instead of that he gave his assent to it and merged his own stock in the new adventure. If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company * * *" (1 Wall. 41)

There is such a power given corporations in the majority of states today, and the Virginia Merger Statute contains the power exercised in this instance. Under the power granted by the Virginia statute as construed, the interest in corporate assets of a minority stockholder can be taken from him and given to another corporation, without providing just compensation. This surely presents a substantial Federal question.

The power granted to a dominant majority by the Virginia statute, and similar statutes in other states, must be controlled and guided by the requirements of the Fourteenth Amendment. The exercise of this power constitutes an exercise of the power of eminent domain which the legislature

has given to the corporation in which the dissenter holds stock. This is clearly brought out in the *Narragansett Electric Lighting Company* v. *Sabre*, 50 R. I. 288, 146 A. 777, and other cases to be cited.

The *Narragansett* case involved a consolidation by the transfer of assets from the Narragansett Electric Company to the United Electric Power Company. Dissenting stockholders filed motions to prevent the transfer on the grounds that the transfer violated rights guaranteed to dissenting stockholders by the United States Constitution. The Rhode Island Court measured the legislative act granting this power against the Federal Constitution, and found it lawful.

However, in discussing the right exercised by the Narragansett Company, the Court held it to be a taking by eminent domain, as follows:

> "We think it is clear that the legislative intent, as expressed in said act and amendment, was to authorize a taking by eminent domain * * *" (146 A. 780)
>
> "* * * The old company was granted power to condemn, provided two-thirds of the stockholders in interest so voted." (146 A. 784)

While it is true that the Narragansett Company was a utility company, the reasoning of the case—likening the taking of the dissenters' property to the exercise of the power of eminent domain—is applicable to all private corporations. The Narragansett Company was a private corporation and it was empowered to take the dissenting stockholders' interest, because the legislature had deemed it to the public interest that such power be granted. The Virginia Merger Statute, authorizing the merger of similar corporations and the taking of dissenters' property, is likewise an expression that such mergers are deemed to be in the public

interest. In both the *Narragansett* case and the present case, there is a taking of dissenters' property for private purposes which are thought to be in the public interest. In both cases, the old corporation is exercising a power granted by the legislature authorizing it to condemn the property rights of a minority. In the *Narragansett* case, the exercise of this power was measured by the provisions of the United States Constitution, including the Fourteenth Amendment, and was found proper. In this present case, the exercise of this power by the majority stockholders in U. S. Distributing—The Pittston Company being the dominant stockholder—must also be measured by the Fourteenth Amendment. When so measured, the power granted by the Virginia Merger Statute does not, as shown in appellants' Statement as to Jurisdiction, meet the requirements of due process, for it omits one element of just compensation, interest from day of taking to day of payment.

A number of other cases support the view that the taking of dissenters' stock in merger or consolidation proceedings pursuant to the taking power granted the corporation by a state statute is a taking of the dissenters' property in the exercise of the power of eminent domain, and consequently, must be measured by the requirements of the Fourteenth Amendment.

In *Jackson Company* v. *Gardiner Investment Company*, 200 F. 113, the Court considered the rights of a dissenting stockholder in a matter involving the sale of assets of his corporation, and the question arose as to whether he was entitled to intrinsic value or market value of his stock. The Circuit Court of Appeals for the First Circuit expressed itself as follows on this question:

> "Except under rules of eminent domain, no owner of property can be compelled to dispose of it at a mere

> market value; but every one is justly entitled to hold it for its intrinsic value * * *" (200 F. 116)

That statement necessarily carries with it the conclusion that where a statute compels an owner to transfer his property to another corporation on terms fixed by a dominant majority, the power is one of eminent domain and must be governed by the requirements of the Fourteenth Amendment.

In *Mills* v. *Central Railroad*, 41 N. J. Eq. 1, 2 A. 453, a majority of the stockholders of the Central Railroad attempted to lease the property of the Central to the Reading Railroad for 999 years, without the consent of all stockholders. In holding the lease void for lack of consent of the minority, the New Jersey Court said that the minority interest,

> "* * * cannot be taken or controlled *in invitum* except under the right of eminent domain * * *." (2 A. 455)

And in *Spencer* v. *Seaboard Air Line Ry. Co.*, 137 N. C. 107, 49 S. E. 96, involving the consolidation of railroads under North Carolina law, certain dissenting stockholders objected to a consolidation of the Seaboard with another railroad without their consent. The Seaboard answered that the power to consolidate with another was expressly provided by statute. The North Carolina court upheld the consolidation statute as an exercise of the power of eminent domain, saying:

> ". . . the statute conferring the power upon the several railroad companies consolidating expressly provides for paying the dissenting stockholder the full value of his stock at the time of the consolidation. This provision can only be sustained by invoking the right of eminent

domain, and condemning the stock for a public use by making compensation therefor."

* * *

"The legislature, in the exercise of its power, confers upon the majority of the stockholders the power to consolidate with the other constituent companies, and accept in consideration therefor such number of shares in the new or consolidated corporation as may be agreed upon. This can be done only with the consent of the Legislature. The Legislature, having decided that such consolidation was promotive of the public welfare, recognized that it had no power to compel a dissenting stockholder to accept stock in the new corporation. Therefore, in the exercise of the right of eminent domain, it empowers the corporation to condemn the stock of such dissenting stockholders when it cannot otherwise be acquired." (49 S. E. 101)

In Virginia, the case of *Tobacco Products* v. *Plummer*, 161 Va. (unreported), approved as ". . . plainly right . . ." a decision by the Chancery Court of the City of Richmond wherein a dissenter in a sale of assets case was allowed interest on the fair cash value of his stock in the same statutory appraisal procedure involved here. In its opinion in that case, the Chancery Court said:

"What the majority stockholders did was, they lawfully appropriated the dissenting stockholders property to their own and expressed purpose. And the law gives the minority stockholders the right to be paid just compensation for their property thus lawfully appropriated.

"Whether the stock is tortiously taken, or taken under the statute, in either case it is taken against the will of the minority stockholders, the dissenter, and it seems to me that the value of the property, just compensation, should be the same in each case.

* * *

> "Somewhat analogous situations regarding interest are presented courts in condemnation cases where just compensation is to be paid, and the language of Chief Justice Winslow in the case of Appleton v. Railroad Co., 154 Wis. at page 142 so accords with my view on the subject that I repeat it here, said he, 'Just compensation must mean fair and reasonable value at the time the property is taken; just compensation for the property presently taken must necessarily mean, its present value presently paid; it cannot mean its present value to be paid two years in the future *without interest.*' (Italics supplied)
>
> "The cases on the subject of conversion, and condemnation have been cited because the owner of the property converted or condemned is entitled to just compensation, and this is usually arrived at or measured by compensating the person whose property is converted, or condemned, *the fair cash value of the property at the time of the taking with interest from that time.*" (Italics supplied)

Those authorities sustain the appellants' contention that the exercise of this power to merge by the control of a dominant majority takes property from a dissenting minority and must be governed by the same constitutional provisions of the Fourteenth Amendment which control the exercise of the power of eminent domain. Unless these dissenters have entered into a contractual relationship with the majority which would authorize this taking over their objections, without just compensation, the appellee's denial of the above statement presents a substantial Federal question.

B.

There Has Been No Waiver.

It is true that the Virginia Merger Statute is a part of the contract of these dissenters and that statute, as now con-

strued, requires the payment to the dissenter of fair cash value ascertained by appraisal. While it is thus correct that the dissenter has consented that the intrinsic value as of the day of merger,—one element of just compensation,—is to be measured by appraisal, he is deprived of just compensation if he does not also get the other item of just compensation, namely, interest.

While the dissenting stockholder has waived his right to object to merger, he has not consented thereto, and though he consented that the majority may take his assets even against his wishes, this is a coerced consent;—coerced by the dominant majority because it has the power given to it by the legislature to take his property over his objection for merger purposes. But he did not agree to forego his rights to just compensation, under the due process requirements guaranteed by the Fourteenth Amendment.

The consent which the dissenters gave at the time of their purchase of stock was a mere consent that they would not exercise their equity right—as demonstrated in the *Clearwater* case—to block the merger desired by a majority. The consent is merely an agreement by the stockholder that the merger go through on majority approval, but that was to be subject to the dissenting minority being given just compensation under the due process clause of the Fourteenth Amendment.

Furthermore, while these dissenters contracted to have the fair cash value of their stock measured by the appraisal method, in the event they objected to a merger, they agreed to accept this value payable as of the time of the merger, not payable several years after the merger; and also subject to just compensation, as required by the Fourteenth Amendment, carrying interest from the day of taking to the day of payment. If the fair cash value was not paid at the date of the merger, the dissenters have not in any way waived their

right to interest on this value from the time of the taking to the time of payment. The fair cash value, while not fixed until subsequent to the merger, was ascertainable by acceptable standards and consequently would accrue interest. *Robertson* v. *Miller,* 286 F. 503, affirmed 266 U. S. 243, 45 S. Ct. 73.

As pointed out in the *Robertson* case:

> "* * * One who has the use of money owing to another justly may be required to pay interest from the time the payment should have been made. * * *" (266 U. S. 257)

The dissenters, while contracting to have the fair cash value measured by appraisal, as of the date of the merger for their stock—a definite, liquidated amount to be determined by standard procedure—must be deemed to have contracted that their rights to interest on this sum during the litigation required under the statute, be governed by the customary rules of interest fixed by due process requirements of just compensation.

That the dissenters did not waive the interest under the due process clause is shown in another way.

At the time these dissenters acquired their stock, the fair cash value provision of the Virginia sale of assets statute applicable to corporations had been construed to allow interest on that value, in a statutory appraisal procedure like the one in the present case. While Justice Eggleston, in his opinion below, did attempt to distinguish between the merger case here and the sale of assets case involved in *Tobacco Products* v. *Plummer,* 161 Va. unreported, the fact remains that in 1934, the Virginia Court of Appeals had affirmed as "* * * plainly right * * *", a lower court decision in the *Tobacco Products* case allowing interest during an appraisal

procedure to determine the fair cash value of dissenters' stock.

In his minority opinion here, Chief Justice Hudgins emphasized that the Virginia Court of Appeals had previously decided that interest must be allowed from the date of merger until payment on the fair cash value of dissenters' stock determined by appraisal procedure. As to whether such interest should be allowed, the Chief Justice stated that

> "In my opinion this is not an open question in Virginia. To substantiate this conclusion, I am citing below decisions of this court and other authorities indicating that pursuant to the former construction of the merger statutes, dissenting stockholders were entitled to receive interest on the fair cash value of their stock from the date of the merger until paid." (53 S. E. (2d) 44)

Chief Justice Hudgins then recited the Chancery Court's opinion in the *Tobacco Products* case, after which he continued as follows:

> "I have adopted the unusual course of quoting at length from the opinion of Judge Moncure and the order of this court refusing to review the case in order to remove all doubt of the fact that the same argument advanced in this case against the allowance of interest from the date of the merger was advanced in the Tobacco Products Corporation case and was rejected by unanimous vote seventeen years ago.
>
> "In 21 V. L. R. p. 825, Judge Moncure's opinion in this case was discussed at length, and additional reasons were given for approval of what is there referred to as the 'Virginia Doctrine.' The article concludes as follows: 'The instant decision, therefore, appears to be eminently sound in holding that the stockholder becomes a creditor of the corporation as of the appraisal date, and that the obligation bears interest from that time.' "

A fundamental principle of contract construction is that the parties are presumed to have bargained with each other on the basis of existing law, including the judicial construction theretofore placed on a statute. *Great Northern Ry. Co.* v. *Sunburst Oil*, 287 U. S. 358, 53 S. Ct. 145. In the *Sunburst Oil* case, the Supreme Court, in interpreting contract rights where a state court had reversed itself on an interpretation of state law, pointed out that the first decision of the state court—

> "* * * was law until reversed and would constitute the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it."

Further, in the *Sunburst Oil* case, this court stated that the parties involved in the litigation

> "* * * would be presumed to bargain with each other on the basis of existing law." (287 U. S. 362)

As Virginia law allowed interest on fair cash value of a dissenter's stock during appraisal proceedings, at the time these dissenters purchased their stock, their contract must be construed in that light. Consequently, it cannot be said that the dissenters have waived their right to interest, or have contracted away their property for less than the just compensation guaranteed by the Fourteenth Amendment.

So far as these dissenters are concerned, the situation is as if the merger statute had been altered, subsequent to their becoming stockholders, to deny interest on the fair cash value, which the dissenter was entitled to under the Fourteenth Amendment. This presents a situation analogous to cases where a statute is enacted after a stockholder has acquired his stock, authorizing a merger or consolidation

upon payment to a dissenter of the market value of his stock. In such cases, as pointed out in *Swan* v. *Barnes,* 117 W. Va. 147, 184 S. E. 257, the theory of eminent domain is relied upon to support the merger.

The *Swan* case, referring to an annotation in 1 L. R. A. (N. S.) 604, which collates cases of this nature, pointed out that they

> "* * * proceed upon the theory of eminent domain, and reason that the shares of the dissenting stockholders, which are to all intents and purposes condemned, cannot be permitted to stand in the way of a merger or consolidation in the public interest. On this theory, so these cases reason, the shares were acquired subject to be taken from the stockholder for public use upon just compensation being made under the law. * * *" (184 S. E. 259)

Had the Virginia Merger Statute been passed subsequent to these dissenters' purchase of stock, the action of the dominant majority would clearly have been in the exercise of a power of eminent domain, and the dissenters would have been entitled to just compensation, including interest. In this case, the merger statute as now construed, denies interest to dissenters, though it provides that the fair cash value as of the day of merger be fixed under the same appraisal procedure before the court in the *Tobacco Products* case, where interest was allowed. ***The statute, as now construed by the Virginia Court, authorizes the taking of dissenters' property under terms and in a manner contrary to those existing at the time of the dissenters' contract. Consequently, this taking is not—and cannot be—pursuant to any contractual relationship, but must be in the exercise of the power of eminent domain. It follows that just compensation, including interest on the fair cash value, must be allowed.***

III.

THE MERGER STATUTE, AS CONSTRUED BY THE VIRGINIA COURT, CREATES A BAR FOR THE DISSENTER, WHICH THE FOURTEENTH AMENDMENT WAS DESIGNED TO PREVENT.

The decision of the Virginia Court, depriving the dissenter of interest required under the just compensation rule of the 14th Amendment, is a deterrent to the dissenter from dissenting, because, invariably, the amount offered is inadequate and the dissenter is left the choice of an expensive litigation without receiving his interest, or agreeing to the merger on the terms fixed by the majority.

This very statute gives the dissenter another handicap, in that it leaves the corporation in the position to offer an inadequate amount for the value of the interest of the dissenter, secure in the fact that if, eventually, it has to pay the true value, it would have to pay that amount only after years of litigation, without interest. The dissenter, on the other hand, is deterred from litigating the inadequate amount offered, because he not only loses the amount of money in the meantime, he incurs the expenses and does not receive any interest for the time that intervenes, even though the corporation itself has the use of the assets and the substantial profits therefrom. The corporation can fight and win in either event, because, in the one instance, it has the use of the money without interest, and, in the other instance, if the litigant gets tired and does not fight, it pays an inadequate amount, such as the original offer, or a settlement thereof. On the other hand, the dissenter himself either must drop the fight and accept the inadequate amount that was offered, or else, have a long litigation, loss of the use of the money in the meantime, and eventually receive only that

which he should have had in the first place, without getting interest, and having had his trouble and expenses besides.

In the case at bar, for example, the amount originally offered was $35.00 per share, while the amount that the appraisers eventually awarded was $57.75, considerably more than the original offer. It has cost the dissenter a substantial sum of money to litigate in the meantime. If he is deprived of his interest, his fight was in vain.

The Fourteenth Amendment was enacted so as to require people to pay just compensation and if the rights of a dissenter are construed so as to be protected by the Fourteenth Amendment, the corporation that takes a dissenter's stock will be induced to make a fair offer in the first place, so as to avoid a litigation wherein it will have to pay interest, and thus be insured that a fair value is paid to the dissenter. That is the purpose of the Fourteenth Amendment, which this decision violates.

IV.

CONCLUSION.

There is no contention on the part of these appellants that this taking was illegal. Admittedly, the merger proceeding—the taking—is lawful, because the dissenter agreed to that by his purchase of stock, but it was subject to the dissenters' right to just compensation under the Fourteenth Amendment. The payment for the dissenters' stock without interest from the time of taking does not meet the requirements of the Fourteenth Amendment, and the dissenters have never agreed by any action to accept fair cash value without interest from the date of taking to the date of payment. They never agreed to accept less than just compensation, which is the intrinsic value plus interest.

The actual merger of the dissenters' corporation with

Pittston is one thing. As to that, the dissenters have agreed that it may be accomplished without their approval. The compensation to these dissenters is another thing, entirely distinct from the merger itself. The merger is a transaction between U. S. Distributing and The Pittston Company. The payment to these dissenters is a matter between them and U. S. Distributing (which obligation Pittston assumed) and must be governed by the requirements of just compensation under the Fourteenth Amendment.

The elements of just compensation include the value of that which is taken, plus interest on that value from the time of taking until the date of payment. The value of that which is taken has been fixed, pursuant to statute, by the appraisal procedure, and, on that value, interest must be allowed until payment is made. There has been no agreement on the part of these dissenters to receive less than what is due them under the provisions of the due process clause of the Fourteenth Amendment.

WHEREFORE, Appellants respectfully submit that the questions involved in this appeal as stated and discussed in the Statement as to Jurisdiction are substantial Federal questions which merit the consideration and decision of this Court.

Respectfully submitted,

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No. 116. WINN ET AL. *v.* PITTSTON COMPANY. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *John J. Wicker* and *Harris J. Griston* for appellants. *Robert T. Barton, Jr.* and *Theodore S. Hope, Jr.* for appellee. Reported below: 191 Va. 886, 63 S. E. 2d 34.